

Reserved on : 20.07.2017

Delivered on : 11.08.2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 11.08.2017

CORAM

THE HON'BLE Mr. JUSTICE M.DURAI SWAMY

W.P.Nos.7251 & 7252 of 2017 and
W.M.P.Nos.7886, 7887, 10419, 10420, 10492 AND 10493 OF 2013

M/s.Travel News Services (India) Private Limited
rep by its General Manager Sanjay Mittal
Holiday Inn, Asset Area 12, Hospitality District,
Aero City, Delhi International Airport,
New Delhi - 100 037.

... Petitioner in both W.Ps

Vs.

1.Airports Authority of India (Southern Region),
rep by its Regional Executive Director,
Office of Regional Executive Director,
Operational Offices, Southern Region,
Chennai - 600 027.

2.Bhawar Lifestyle,
91, Model House Road, Basavangudi,
Bengaluru - 560 004, Karnataka, India.

3.Evolve Business Ventures,
Outer Circle, Near State Bank of Mysore,
Whitefield, Bengaluru, Karnataka - 560 066.

4.Airports Authority of India,
rep by its Chairman,
Rajiv Gandhi Bhawan, Safdarjung Airport,
New Delhi - 110 003.

5.Airport Director,
Airports Authority of India,
Chennai International Airport,
Chennai - 600 027.

... Respondents in both W.Ps

(R5 impleaded vide order dated 09.06.2017 made in
WMP.Nos.13463 to 13466 of 2017 in W.P.Nos.7251 & 7252 of 2017)

Constitution of India praying to issue a writ of mandamus forbearing the 1st respondent from awarding the Letter of Award to the 3rd respondent and consequently award the same to the petitioner being the highest bidder post disqualification of 3rd respondent at the technical evaluation stage.

W.P.No.7252 of 2017 filed under Article 226 of The Constitution of India praying to issue a writ of declaration declaring that the bid submitted by the 3rd respondent pursuant to the Request For Proposal dated October 2016 is contrary to the tender condition of RFP dated October 2016.

For Petitioner in : Mr.P.S.Raman, Senior Counsel
both WPS and
Mr.C.Manishankar,
Additional Advocate General
for Mr.K.Krishnamoorthy

For Respondents : Fr.Xavier Arulraj, Senior Counsel
in both WPs for Ms.A.Arul Mary (R1, R4 & R5)
Mr.J.Sivanandha Raj
for Ms.Ridhima Sharma (R3)
No appearance - R2

C O M M O N O R D E R

W.P.No.7251 of 2017 has been filed by the petitioner viz., Travel News Services (India) Private Limited to issue a writ of mandamus forbearing the 1st respondent from awarding the Letter of Award to the 3rd respondent and consequently, award the same to the petitioner, being the highest bidder, post disqualification of 3rd respondent at the technical evaluation stage.

2.W.P.No.7252 of 2017 has been filed by the very same petitioner to issue a writ of declaration declaring that the bid submitted by the 3rd respondent pursuant to the Request For Proposal dated October 2016 is contrary to the tender condition of RFP dated October 2016.

3.Since the issues involved in both the Writ Petitions are common and are in respect of the very same tender notification, both the Writ Petitions are disposed of by this common order.

4.The brief case of the petitioner necessary for the disposal of the Writ Petitions is as follows:

(i)The petitioner is engaged in the business of Operation and Management of Travel Retail Shops, which sell and deal in Travel Retail Goods for sale at Airports and other places. The petitioner is operating such Travel Retail Shops, inter alia, at various Airports in India, for which they have signed

contracts thereof to operate with the Airports Authority of India and other Airport Operators of India. The 1st respondent floated a tender for Appointment of Master Concessionaire to Design, Build, Finance, Operate and Maintain General Retail Outlets at Chennai Airport (the tender) in October 2016. After the technical opening of the bid, the e-tender portal of the 1st respondent disclosed that the following entities have evinced interest in the bidding process and have submitted their bids:

- | | |
|---|------------------------------|
| a) Bhawar Lifestyle | - 2 nd respondent |
| b) Evolve Business Ventures | - 3 rd respondent |
| c) Krishna Pearls and Jewellers | |
| d) Travel News Services India Private Limited | - |
- Petitioner
- e) William Penn Private Limited

(ii) In the Request For Proposal (RFP), there is a Clause on Conflict of Interest among bidders for eligibility of bidders, which reads as follows:

Clause 2.2 Eligibility of Bidders:

2.2.1 For determining the eligibility of Bidders for their short-listing hereunder the following shall apply:

(c) A Bidder shall not have a conflict of interest (the "Conflict of Interest") that affects the Bidding Process. A Bidder found to have a Conflict of Interest shall be disqualified. A Bidder shall be deemed to have a Conflict of Interest affecting the Bidding Process, if:

(vi) such Bidder, or any Associate thereof has a relationship with another Bidder, or any Associate thereof, directly or through common third party/parties, that puts either or both of them in a position to have access to each other information about, or to influence the Proposal of either or each other;

Clause 6 Fraud and Corrupt Practices

6.1 The Bidders and their respective Officers, employees, agents and advisers shall observe the highest standard of ethics during the Bidding Process. Notwithstanding anything to the contrary contained herein, the Authority may reject an Application without being liable in any manner whatsoever to the Bider if it determines that the Bidder has, directly or indirectly or through an agent, engaged in corrupt practice, fraudulent practice, coercive practice, undesirable practice or restrictive practice in the Bidding Process.

6.3 For the purposes of this Clause 6, the following terms shall have the meaning hereinafter respectively assigned to them:

(e) "Restrictive practice" means forming a cartel or arriving at any understanding or arrangement among Bidders with the objective of

restricting or manipulating a full and fair competition in the Bidding Process.

(iii) Immediately after the opening of the Technical Bid and disclosure of list of entities who submitted their bids, on research, the petitioner came to know that the 2nd respondent and the 3rd respondent were related and are under the same management team and moreover, both the 2nd and 3rd respondents belonged to the members of the same family and have common control and thereby, both of them are in a position to have access to each other information or to influence the proposal of either or each other in violation of Clause 2.2.1(c)(vi), hence, the petitioner addressed various communications to the respondents 1 & 4 pointing out the above violation of RFP conditions and requested them to disqualify the bids submitted by the respondents 2 & 3. However, without appreciating the same, the 1st respondent opened the Financial Bids on 22.12.2016, along with the price comparison chart of the Bidders and on opening the Financial Bids, declared the 3rd respondent as the highest Bidder, as the 2nd respondent was already disqualified. After repeated reminders by the petitioner, the 1st respondent finally replied stating that there is no legal relationship between the 2nd and 3rd respondents as envisaged in the RFP and proceeded with the award of the tender. In these circumstances, the petitioner has filed the above Writ Petitions.

5. The brief case of the respondents 1, 4 & 5 is as follows:

(i) According to the respondents, the Writ Petitions are not maintainable. The Bid submitted by the 3rd respondent had crystallized into an Award as early as on 04.03.2017. The petitioner has not preferred to challenge the same, therefore, the prayer sought for in the Writ Petitions have become infructuous.

(ii) According to the respondents, the entire tender process has been carried out in a fair and transparent manner and as a result, a lawful award has been made, which cannot be legally interfered with at this stage. The deadline for online submission of tenders was upto 12.00 hours on 15.11.2016 and the time for opening Technical Bids/Proposals through online was scheduled at 15.00 hours on 15.11.2016. The opening of Technical Bids was further postponed for valid reasons. Finally, when the Financial Bids were opened on 08.12.2016, it was recorded that the following entities had participated in the Bidding Process:

- | | |
|---|------------------------------|
| a) Travel News Services India Private Limited | - |
| Petitioner | |
| b) Krishna Pearls and Jewellers | |
| c) Evolve Business Ventures | - 3 rd respondent |
| d) Bhawar Lifestyle | - 2 nd respondent |
| e) William Penn Private Limited | |

(iii) The Bhawar Lifestyle was a Consortium, along with Lazy Tiger Retail Private Limited, while the Travel News Services India Private Limited was another Consortium, along with Flemingo. When the Technical Bids were opened and scrutinized, the entity of Bhawar Lifestyle Consortium was disqualified as its eligibility was not in compliance with the requirements of RFP. After the rejection of one of the Bidders, finally, four Financial Bids were opened on 22.12.2016. The competitive quotations in Financial Bids stood as follows:

S.No.	Name of the Bidder/ Entity	Grand Total amount in percentage
1.	Travel News Services India Private Limited	23.00
2.	Krishna Pearls and Jewellers	19.00
3.	Evolve Business Ventures	25.00
4.	William Penn Private Limited	20.00

(iv) As Evolve Business Ventures had quoted the highest amount, it was selected as H-1 to be awarded the Concessionaire for the said tender called "A Master Concession for Development, Operation and Maintenance of General Retail Outlets". Subsequent to the selection of the successful bidder by a fair and transparent tender process, the selected entity, the 3rd respondent was issued with the Letter of Award on 04.03.2017 by the 5th respondent. Therefore, the tender process had reached its legal finality and the successful entity, the 3rd respondent is in the process of complying with the tender conditions as per the terms of the contract of the Concessionaire as stipulated in Clause 4.2.1 and 4.2.2 of RFP. There is no illegality or arbitrariness in the entire process. The 3rd respondent is ready to execute the Concessionaire Agreement and Integrity Pact, as stipulated in the RFP.

(v) The Writ Petitions have been filed with ulterior motive to scuttle the process of implementation of a lawful award. The petitioner has filed the Writ Petitions after a huge delay, that too, after the final award has been made in the tender. The prayer in W.P.No.7251 of 2017 is for a mandamus forbearing the respondents from issuing the Letter of Award to the 3rd respondent. Since the Award has already been issued on 04.03.2017, the said prayer has become infructuous. The prayer in W.P.No.7252 of 2017 is for declaration that the bids submitted by the 3rd respondent to RFP dated October 2016 is contrary to the tender conditions. Since the said process that had started with Request For Proposal, had already reached its finality, once the Award is made on 04.03.2017, the prayer for declaration does not survive, therefore, both the Writ Petitions have become infructuous in the light of the Award and not maintainable at this stage.

(vi)The petitioner has made a baseless allegation stating that the technical proposals of the respondents 2 & 3 and the acceptance and qualification of the same are illegal. The proposals made by the respondents 2 & 3 were scrutinized in the light of the eligibility criteria and after a thorough evaluation, the proposal of the 2nd respondent was rejected in the Technical Bid itself, while the proposal of the 3rd respondent was alone accepted. The apprehension of the petitioner was whether the respondents 2 & 3 are part of a single group called Bhawar Group. When the objection was raised by the petitioner, the 2nd respondent was already out of the picture as it had already been disqualified in the Technical Bid.

(vii)The contention of the petitioner that the 2nd respondent is closely "connected" with the 3rd respondent and that they have strong "link" and "clear and undoubted relation", is without any basis. The 3rd respondent is a Proprietary Concern owned by Mrs.Mamta Lunked and not by another in their family. She is not a member of a Consortium of the 2nd respondent. As per the documents submitted by the 2nd respondent, it is also a Proprietary Concern under one K.B.Sunil Kumar and it is not owned by anyone in their extended natural family. There is no common business or corporate relationship or shareholding or controlling or ownership between both the entities. Thus, there is no other relationship between the legal entities, resulting in conflict of interest.

(viii)The tenders cannot be dealt with on the basis of common apprehension, but only on legal barriers, amounting to disqualification based on eligibility criteria. If the petitioner was in possession of irrefutable evidence, he could have approached this Court at the earliest point of time, without waiting for more than three weeks after the Award was made. The petitioner has filed the Writ Petitions only in frustration, as he has lost the tender at a close call. There is no common holding or control over each other of their entities. The petitioner wants to confuse this Court by equating family relationship with corporate relationship. Except for his apprehension and certain materials available from social media or internet, no other legal evidence has been submitted in support of their allegations. The letters written by the petitioner requesting for disqualifying the respondents 2 & 3 were suitably replied by the 4th respondent on 12.01.2017 stating that both the entities do not have common controlling, shareholding or ownership interest as envisaged in Clause-2.2.1 of the RFP. Not being satisfied, the petitioner again raised the same complaint on 11.01.2017. Again the 4th respondent clarified to the petitioner in their letter dated 24.01.2017 that its apprehensions are unfounded. Only after all these clarifications and legal opinions, the Letter of Award was issued to the successful bidder on

04.03.2017. There is no illegality or arbitrariness in the said tender process. The tender process had culminated in a lawful award.

(ix) The Financial Bids were opened on 22.12.2016 and the 3rd respondent was declared as the highest bidder based on its quotations of a revenue share of 25%. There is no reason for disqualifying the 3rd respondent. The 2nd respondent was disqualified in the Technical Bid by the 4th respondent authority. Once the tender bid is technically disqualified, the Financial Bid will not be opened. The 2nd respondent's tender was disqualified earlier as it had not complied with the conditions of RFP. The EMD was paid by the 3rd respondent in proper form. Since the 2nd respondent had not complied with the conditions of RFP, it was disqualified. There is nothing illegal in engaging a Professional Consultant, who is engaged in Corporate services including for e-tender process. As there are technical nuances in the process involved in e-tender, anyone can avail their professional services. There is no illegality in accepting the Technical and Financial Bids of the 3rd respondent as it was fully eligible. There was no conflict of interest since the respondents 2 & 3 are separate entities. They were not Associates as defined in the RFP. There was no suppression of fact on the part of the 3rd respondent and the documents have been accepted after thorough scrutiny. In these circumstances, the respondents 1, 4 & 5 pray for dismissal of the Writ Petitions.

6. The brief case of the 3rd respondent is as follows:

(i) According to the 3rd respondent, on 04.03.2017, the Airport Authority of India accepted the 3rd respondent's Bid proposal and issued a Letter of Intent. On 07.03.2017, the 3rd respondent accepted the terms and conditions set out in the Letter of Intent by which the contract was concluded. According to the 3rd respondent, the petitioner has not described the respondents 2 & 3 correctly. The 2nd respondent is not the sole bidder and the true facts are that the 2nd respondent gave its bid by forming a Consortium along with Lazy Tiger Retail Private Limited represented by its Director, Vineetha Pai. This fact was maliciously suppressed only to make baseless allegations that the respondents 2 & 3 are related parties. The fact that the 2nd respondent is a Consortium is a material fact and the same has been suppressed by the petitioner. The petitioner has falsely stated in the affidavit that the 2nd respondent is managed by one Vinod Lunked, when Airport Authority has clearly stated that the 2nd respondent (i.e.) Bhawar Lifestyle is clearly represented by Sunil Kumar. A false statement has been made only to mislead and prejudice the Court as it has been alleged that Vinod Lunked is the husband of Mamta Lunked, who is the Sole Proprietor of the 3rd respondent. The petitioner has falsely stated in the affidavit that the EMD/Fee was paid by the respondents 2 & 3 purportedly from the same bank account. Once again, this statement is false and has been made to mislead

the Court.

(ii) As per Clause-6 of the RFP, if the Bidder indulges in any unethical, unfair, corrupt, fraudulent, undesirable practices, the bid can be rejected. In the present case, the petitioner obtained a letter issued by the Chartered Accountant to the Airport Authority clarifying certain facts pertaining to the Bid. The confidential letter has been obtained by the petitioner by corrupt, fraudulent and undesirable practice. According to the 3rd respondent, the prayer for declaration and mandamus are not maintainable. The relationship mentioned in Clause-2.2.1(c)(vi) should be a commercial relationship of control and interest and not mere blood relation. Further, this alone is not sufficient and it also has to be proved that either or both of them are in a position to have access to each others information and influence each others proposal. The petitioner has not produced unimpeachable document or material to prove the above mentioned requirements. The petitioner's allegation that the 3rd respondent violated the conditions of the RFP in making its EMD payment is denied as false. The 3rd respondent had correctly deposited its EMD into the specific account designated to the 3rd respondent by the 1st respondent. The allegation made by the petitioner raised a doubt whether the Bhawar Lifestyle was planted by the petitioner. The allegation that the respondents 2 & 3 have a so called strong link by virtue of marriage between Vinod Lunked and Mamta Lunked is denied as false. It is true that Mamta Lunked is the Sole Proprietor of the 3rd respondent and her husband Vinod Lunked is not connected by way of Management, shareholding or stake whatsoever in the 3rd respondent. In these circumstances, the 3rd respondent prays for dismissal of the Writ Petitions.

7. Heard Mr.P.S.Raman, learned Senior Counsel and Mr.C.Manishankar, learned Additional Advocate General appearing for the petitioner, Fr.Xavier Arulraj, learned Senior Counsel appearing for the respondents 1, 4 & 5 and Mr.J.Sivanandha Raj, learned counsel appearing for the 3rd respondent.

8. Submissions of Mr.P.S.Raman, learned Senior Counsel and Mr.C.Manishankar, learned Additional Advocate General for the petitioner are as follows:

8.1. The petitioner was not aware of the Award at the time of the filing of the Writ Petitions nor was the Letter of Award available in any public form. Further, the application filed seeking details about the Letter of Award was rejected by the respondent Authority stating that the same was subjudiced before this Court. An appeal filed by the petitioner as against the same was also rejected stating that the information sought is confidential, therefore, the petitioner did not have any occasion to challenge the Letter of Award. Further, the learned senior counsel submitted that the Hon'ble Supreme Court has repeatedly held that the Courts

have ample powers under Article 226 of the Constitution to mould the relief and give a relief even if a prayer is not sought.

8.2. With regard to Conflict of Interest between the respondents 2 & 3, the learned senior counsel submitted that Clause-2.2.1(c)(vi) states that it is a Conflict of Interest if a bidder has relationship with another bidder directly or through common third party that puts either or both of them in a position to have access to each other information about, or to influence the proposal of either or each other. Hence, the conditions mentioned therein or "either or" and it is a Conflict of Interest if anyone of the conditions mentioned in Clause-2.2.1(c)(vi) is made out and it is not necessary that both conditions should exist. Therefore, the respondents are in Conflict of Interest even if they are in a position to have access to each other information. Hence, according to the learned senior counsel, common control between the bidders is not necessary to constitute Conflict of Interest as claimed by the respondents.

8.3. Further, the learned senior counsel submitted that in the Website of the Bhawar Group, it has been mentioned that the Managing Director of Bhawar Group is Vinod Lunked, who is the husband of the 3rd respondent and the Director of Bhawar Group is Sunil Lunked, who is the owner of the 2nd respondent and brother-in-law of the 3rd respondent Proprietrix. Further, the learned senior counsel submitted that in the profile of Bhawar Group, the names of Vinod Lunked and Sunil Lunked has been mentioned as Promoters of Bhawar Group. The address of Bhawar Group found in the Website is same as the address of the 3rd respondent as mentioned in Page-267 of the typed set of papers. The address also matches with the address of the 3rd respondent found in Form ST-2 of the 3rd respondent and also the letter head of the 3rd respondent, which has been enclosed in page-34 of the 1st respondent's typed set of papers. Even the phone number found in Form ST-2 of the 3rd respondent at page-28 of the 1st respondent's typed set of papers is same as the Bhawar Group found in page-264 of the petitioner's typed set. The Logo used in the Bhawar Lifestyle letter head is also the same as that of the Bhawar Group. The Mobile Number found in page-11 of the typed set matches with the Mobile Number of the Bhawar Group found in page-264 of the petitioner's typed set. The registration of Bhawar Group IP address is in the name of Sunil Kumar Lunked (the 2nd respondent) as found in page-11 of the additional typed set of papers. The respondents 2 & 3 have same Phone Number (i.e.) 41466395. The respondents 2 & 3 are also using the same Credit Card swiping machine. The respondents 2 & 3 have used the common Consultant, who have quoted the 3rd respondent's Account ID for depositing the EMD of the 2nd respondent, hence, the 2nd respondent's bid has been rejected. Therefore, according to the learned senior counsel, the respondents 2 & 3 were in a position to have access to each other information and there was a Conflict of Interest

between them as envisaged in Clause-2.2.1(c)(vi). The Conflict of Interest is an eligibility criteria even for short-listing the bidders. When there is a disqualification clause prescribed by the tender documents, if the Court exercising Writ jurisdiction finds such disqualification, Article 226 will be invoked and such tender process will be declared illegal. The Airports Authority of India has clearly been misled under the belief that there was no relationship between the respondents 2 & 3.

8.4. In support of their contentions, the learned senior counsel appearing for the petitioner relied upon the following judgments:

(i) (2011) 4 Supreme Court Cases 1 [Centre for PIL and another Vs. Union of India and another] wherein the Hon'ble Supreme Court held as follows:

"...

53. At the outset it may be stated that in the main writ petition the petitioner has prayed for issuance of any other writ, direction or order which this Court may deem fit and proper in the facts and circumstances of this Case. Thus, nothing prevents this Court, if so satisfied, from issuing a writ of declaration. Further, as held hereinabove, recommendation of the HPC and, consequently, the appointment of Shri P.J. Thomas was in contravention of the provisions of the 2003 Act, hence, we find no merit in the submissions advanced on behalf of Respondent 2 on non-maintainability of the writ petition. If public duties are to be enforced and rights and interests are to be protected, then the court may, in furtherance of public interest, consider it necessary to inquire into the state of affairs of the subject-matter of litigation in the interest of justice [see *Ashok Lanka v. Rishi Dixit*; (2005) 5 SCC 598]."

(ii) (2013) 4 Supreme Court Cases 690 [Rajesh Kumar and others Vs. State of Bihar and others] wherein the Hon'ble Supreme Court held as follows:

"...

14. Appearing for the appellants, Mr. P.P. Rao, learned senior counsel, argued that the High Court had committed an error in quashing the entire selection process even when the petitioners had not made any prayer to that effect. Mr. Rao was at pains to argue that a relief which was not even prayed for by the writ petitioners could not be granted by the Court whatever may have been the compulsion of equity, justice and good conscience. Reliance in support of that proposition was placed by him upon *Bharat Amratlal Kothari v. Dosukhan Samadkhan Sindhi* (2010) 1 SCC 234 : (2010) 1 SCC

(Cri) 757 and State of Orissa v. Mamata Mohanty (2011) 3 SCC 436 : (2011) 2 SCC (L & S) 83)

15. There is, in our view, no merit in that contention of Mr. Rao. The reasons are not far to seek. It is true that the writ petitioners had not impleaded the selected candidates as party-respondents to the case. But it is wholly incorrect to say that the relief prayed for by the petitioners could not be granted to them simply because there was no prayer for the same. The writ petitioners, it is evident, on a plain reading of the writ petition questioned not only the process of evaluation of the answer scripts by the Commission but specifically averred that the "model answer key" which formed the basis for such evaluation was erroneous. One of the questions that, therefore, fell for consideration by the High Court directly was whether the "model answer key" was correct. The High Court had aptly referred that question to experts in the field who, as already noticed above, found the "model answer key" to be erroneous in regard to as many as 45 questions out of a total of 100 questions contained in 'A' series question paper. Other errors were also found to which we have referred earlier. If the key which was used for evaluating the answer sheets was itself defective the result prepared on the basis of the same could be no different. The Division Bench of the High Court was, therefore, perfectly justified in holding that the result of the examination insofar as the same pertained to 'A' series question paper was vitiated. This was bound to affect the result of the entire examination qua every candidate whether or not he was a party to the proceedings. It also goes without saying that if the result was vitiated by the application of a wrong key, any appointment made on the basis thereof would also be rendered unsustainable. The High Court was, in that view, entitled to mould the relief prayed for in the writ petition and issue directions considered necessary not only to maintain the purity of the selection process but also to ensure that no candidate earned an undeserved advantage over others by application of an erroneous key."

(iii) (2015) 3 Supreme Court Cases 251 [Board of Control for Cricket in India Vs. Cricket Association of Bihar and others] wherein the Hon'ble Supreme Court of India held that the scope of conflict of interest is not that such conflict

resulted in any abuse of position, but mere possibility of such abuse, taint such transactions.

(iv) (2013) 14 Supreme Court Cases 737 [Bangalore Development Authority Vs. Vijaya Leasing Limited and others] wherein the Apex Court held as follows:

"...

12. In the abovesaid background, the question for consideration is, therefore, whether such a conclusion of the learned Single Judge and the ultimate order passed by him can be held to be justified in exercise of his power and jurisdiction under Article 226 of the Constitution.

13. To appreciate the legal position we only wish to refer to two of the decisions of this Court reported in Dwaraka Nath v. ITO, AIR 1966 SC 81 : (1965) 2 SCJ 296 and Gujarat Steel Tubes Ltd v. Mazdoor Sabha, (1980) 2 SCC 593 : 1980 SCC (L&S) 197. In Dwaraka Nath case, AIR 1966 SC 81 : (1965) 2 SCJ 296, the Supreme Court stated as under:

"4....This article is couched in comprehensive phraseology and it ex facie confers a wide power on the High Courts to reach injustice wherever it is found. The Constitution designedly used a wide language in describing the nature of the power, the purpose for which and the person or authority against whom it can be exercised. It can issue writs in the nature of prerogative writs as understood in England; but the scope of those writs also is widened by the use of the expression 'nature', for the said expression does not equate the writs that can be issued in India with those in England, but only draws an analogy from them. That apart, High Courts can also issue directions, orders or writs other than the prerogative writs. It enables the High Courts to mould the reliefs to meet the peculiar and complicated requirements of this country. Any attempt to equate the scope of the power of the High Court under Article 226 of Constitution with that of the English Courts to issue prerogative writs is to introduce the unnecessary procedural restrictions grown over the years in a comparatively small country like England with a unitary form of Government to a vast country like India functioning under a federal structure. Such a construction defeats the purpose of the article itself." (Emphasis added)

14. Similarly in Gujarat Steel Tubes Case, (1980) 2 SCC 593 : 1980 SCC (L&S) 197, the relevant principles can be culled out from paragraphs 73 and

"73.While the remedy under Article 226 is extraordinary and is of Anglo-Saxon vintage, it is not a carbon copy of English processes. Article 226 is a sparing surgery but the lancet operates where injustice suppurates. While traditional restraints like availability of alternative remedy hold back the court, and judicial power should not ordinarily rush in where the other two branches fear to tread, judicial daring is not daunted where glaring injustice demands even affirmative action. The wide words of Article 226 are designed for service of the lowly numbers in their grievances if the subject belongs to the court's province and the remedy is appropriate to the judicial process. There is a native hue about Article 226, without being Anglophilic or Anglophobic in attitude. Viewed from this jurisprudential perspective, we have to be cautious both in not overstepping as if Article 226 were as large as an appeal and not failing to intervene where a grave error has crept in. Moreover, we sit here in appeal over the High Court's judgment. And an appellate power interferes not when the order appealed is not right but only when it is clearly wrong. The difference is real, though fine.

81. Broadly stated, the principle of law is that the jurisdiction of the High Court under Article 226 of the Constitution is limited to holding the judicial or quasi-judicial tribunals or administrative bodies exercising the quasi-judicial powers within the leading strings of legality and to see that they do not exceed their statutory jurisdiction and correctly administer the law laid down by the statute under which they act. So long as the hierarchy of officers and appellate authorities created by the statute function within their ambit the manner in which they do so can be no ground for interference." (emphasis added)

15. We are of the view that the above principles when applied to the case on hand, it can be safely concluded that the order of the learned Single Judge in the light of the peculiar facts noted therein cannot be faulted. We also wonder as to why the Hon'ble Minister concerned should have taken upon himself the extraordinary effort of making an inspection for which no special reasons were adduced in the report. That apart none of the reasons which weighed in the report of the Hon'ble Minister reflected the true facts. The conclusion of the Hon'ble Minister that the possession continued to remain with the owner was contrary to

what was found on records. The mahazar dated 9-12-1983 as noted by learned Single Judge from the original file reveal that the conclusion of the Hon'ble Minister was ex facie illegal and untrue. The said conclusion obviously appeared to have been made with some ulterior motive and purpose and with a view to show some undue favour to the first respondent herein. The acquisition became final and conclusive as far back as on 15-7-1971 when Section 6 declaration came to be issued. At no point of time there was any challenge to either preliminary notification dated 21-9-1967 or the final declaration notified on 15-7-1971. Even the award dated 21-11-1983 approved on 29-11-1983 was not the subject-matter of challenge in any proceedings."

9. Countering the submissions made by the learned senior counsel for the petitioner, Fr. Xavier Arulraj, learned senior counsel appearing for the respondents 1, 4 & 5 made the following submissions:

9.1. The prayer sought for in the Writ Petition has become infructuous for the reason that the bidding had crystallized into an Award as early as on 04.03.2017. The respondents are not duty bound to entertain the representations from any bidder during the tender process as per Clause-2.19 of the RFP. The 2nd respondent has been technically disqualified and is out of the picture from the tender process, hence, there is no question of researching its role in the tender process. There is no ground for disqualifying the 3rd respondent in the tender process. The "relationship" or "contact" has to be corporate in nature, if it has to attract disqualification on the ground of "Conflict of Interest". There is no common control upto the level of 75% of shareholding for respondents 2 & 3 to fall within the definition of Associates. There is no point in harping that respondents 2 & 3 are related because the 2nd respondent was not a single entity, but a Consortium along with Lazy Tiger, therefore, the interpretation of relationship among the bidders will not apply. The family contacts of the respondents 2 & 3 had not interfered with the process of tender, either by way of forming a cartel or holding down the upset price. The social media material or other documents pertaining to the relationship of the respondents 2 & 3 have no legal meaning or relevance. As there is no substantial violation of any condition of RFP, the successful bidder has to implement the Award. If there is an ambiguity or minor lapses in respect of ancillary conditions, without violating the essential conditions of RFP, the Award can be protected by this Court on the ground of public interest. When two interpretations are possible, the tendering process authority must be left free to give one of the interpretations, without scuttling the tender

9.2. In support of his contentions, the learned senior counsel appearing for the respondents 1, 4 & 5 relied upon the following judgments:

(i) (1994) 6 Supreme Court Cases 651 [Tata Cellular Vs. Union of India] wherein the Hon'ble Supreme Court held as follows:

"...

68. Having regard to the above arguments we propose to deal with the matter from the following five aspects :

1. The scope of judicial review in matters of this kind.
2. Whether the selection is vitiated by arbitrariness? - (a) regarding financial projection and (b) regarding rental.
3. Bias of Mr Nair - whether affected the selection ?
4. Whether the Apex Committee has been bypassed?
5. Evolving of hidden criteria - whether valid?

...

77. The duty of the court is to confine itself to the question of legality. Its concern should be :

1. Whether a decision-making authority exceeded its powers?
2. Committed an error of law,
3. committed a breach of the rules of natural justice,
4. reached a decision which no reasonable tribunal would have reached or,
5. abused its powers.

Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfillment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:

(i) Illegality : This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.

(ii) Irrationality, namely, Wednesday unreasonableness.

(iii) Procedural impropriety.

The above are only the broad grounds but it does not rule out addition of further grounds in course of time. As a matter of fact, in R. v. Secretary of State for the Home Department, ex Brind (1991) 1 AC 696, Lord Diplock refers specifically to one development, namely, the possible recognition of the principle of proportionality. In all these cases the test to be adopted is that the court should, "consider whether something has gone wrong of a nature and degree which requires its intervention".

...

94. The principles deducible from the above are

:

- (1) The modern trend points to judicial restraint in administrative action.
- (2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.
- (3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.
- (4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.
- (5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.
- (6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

Based on these principles we will examine the facts of this case since they commend to us as the correct principles."

(ii) (1999) 1 Supreme Court Cases 492 [Raunaq International Limited Vs. I.V.R. Construction Ltd., and others] wherein the Hon'ble Supreme Court held as follows:

"...

11. When a writ petition is filed in the High court challenging the award of a contract by a public authority or the State, the court must be satisfied that there is some element of public interest involved in entertaining such a petition. If, for example, the dispute is purely between two tenderers, the court must be very careful to see if there is any element of public interest involved in the litigation. A mere difference in the prices offered by the two tenderers may or may not be decisive in deciding whether any public interest is involved in intervening in such a commercial transaction. It is important to bear in mind that by court intervention, the proposed project may be considerably delayed thus escalating the cost far more than any saving which the court would ultimately effect in public money by deciding the dispute in favour of one tenderer or the other tenderer. Therefore, unless the court is satisfied that there is a substantial amount of public interest, or the transaction is entered into mala fide, the court should not intervene under Article 226 in disputes between two rival tenderers.

...

24. Dealing with interim orders, this Court observed in CCE v. Dunlop India Ltd. (1985) 1 SCC 260 : 1985 SCC (Tax) 75: (1985) 2 SCR 190 (SCR 190 at page 196) that an interim order should not be granted without considering balance of convenience, the public interest involved and the financial impact of an interim order. Similarly, in Ramniklal N. Bhutta v. State of Maharashtra (1997) 1 SCC 134, the Court said that while granting a Stay, the court should arrive at a proper balancing of competing interests and grant a Stay only when there is an overwhelming public interest in granting it, as against the public detriment which may be caused by granting a Stay. Therefore, in granting an Injunction or Stay order against the award of a contract by the Government or a Government agency, the court has to satisfy itself that the public interest in holding up the project far outweighs the public interest in carrying it out within a reasonable time. The court must also take into account the cost involved in staying the project and whether the public would stand to benefit by incurring such cost."

(iii) (2000) 2 Supreme Court Cases 617 [Air India Ltd., vs. Cochin International Airport Ltd., and others] wherein the

Apex Court held as follows:

“... ”

7. The law relating to award of a contract by the State, its corporations and bodies acting as instrumentalities and agencies of the Government has been settled by the decision of this Court in *Ramana Dayaram Shetty v. International Airport Authority*, (1979) 3 SCC 488; *Fertilizer Corpn. Kamgar Union (Regd.) v. Union of India* (1981) 1 SCC 568; *CCE v. Dunlop India Ltd.* (1985) 1 SCC 260 : 1985 SCC (Tax) 75; *Tata Cellular v. Union of India* (1994) 6 SCC 651; *Ramniklal N. Bhutta v. State of Maharashtra* (1997) 1 SCC 134 and *Raunaq International Ltd. v. I.V.R. Construction Ltd.* (1999) 1 SCC 492. The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are of paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the Court can examine the decision making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness. The State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision making process the Court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The Court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the Court should intervene.

“... ”

12. As regards the merits of Cambatta's proposal, it was contended by Mr. Andhyarujina that all the three offers of Cambatta were superior in

terms of parameters laid down by CIAL than Air India's offer. He submitted that even after CIAL unilaterally raised the license fee of Air India from 17 per cent to 20 per cent in the 10th year to match Cambatta's offer and imposed a condition that Air India would not sub-contract, it did not become comparable with the offer of Cambatta as Air India did not offer to pay 2 per cent bonus in license fee. It was also submitted that Air India's representation that it would be able to bring more traffic was illusory and for that reason also Air India's proposal cannot be regarded as superior or even comparable with the proposal of Cambatta. We do not think that CIAL did any wrong in taking into consideration the fact that Air India is an airline and being a national carrier would be in a position to bring more traffic of Air India and other domestic lines if it was awarded the contract. As regards the merits of the rival offers, we do not think it proper to look at only the financial aspect and hold that CIAL did not accept Cambatta's offer, even though it was better, because it wanted to favour Air India or that it had acted under the influence of Air India and the Ministry of Civil Aviation. In a commercial transaction of a complex nature what may appear to be better, on the face of it, may not be considered so when an overall view is taken. In such matters the Court cannot substitute its decision for the decision of the party awarding the contract. On the basis of the material placed on record we find that CIAL bona fide believed that involving a public sector undertaking and a national carrier would, in the long run, prove to be more beneficial to CIAL. For all these reasons it is not possible to agree with the finding of the High Court that CIAL had acted arbitrarily and unreasonably and was also influenced by extraneous considerations during its decision making process."

(iv) (2004) 4 Supreme Court Cases 19 [Directorate of Education and others Vs. Educomp Datamatics Ltd. and others] wherein the Hon'ble Supreme Court held as follows:

"...

13. Directorate of Education, Government of NCT of Delhi had invited open tender with prescribed eligibility criteria in general terms and conditions under tender document for leasing of supply, installation and commissioning of computer systems, peripherals and provision of computer education services in various government/ government-aided senior secondary, secondary and middle schools under the Directorate of Education, Delhi. In the year

2002-2003, 748 schools were to be covered. Since the expenditure involved per annum was to the tune of Rs.100 crores, the competent authority took a decision after consulting the Technical Advisory Committee for finalisation of the terms and conditions of the tender documents providing therein that tenders be invited from firms having a turnover of more than Rs.20 crores over the last three years. The hardware cost itself was to be Rs.40-45 crores. The Government introduced the criterion of turnover of Rs.20 crores to enable the companies with real competence having financial stability and capacity to participate in the tender, particularly in view of the past experience. We do not agree with the view taken by the High Court that the term providing a turnover of at least Rs.20 crores did not have a nexus with either the increase in the number of schools or the quality of education to be provided. Because of the increase in the number of schools the hardware cost itself went upto Rs.40-50 crores. The total cost of the project was more than Rs.100 crores. A company having a turnover of Rs.2 crores may not have the financial viability to implement such a project. As a matter of policy Government took a conscious decision to deal with one firm having financial capacity to take up such a big project instead of dealing with multiple small companies which is a relevant consideration while awarding such a big project. Moreover, it was for the authority to set the terms of the tender. The courts would not interfere with the terms of the tender notice unless it was shown to be either arbitrary or discriminatory or actuated by malice. While exercising the power of judicial review of the terms of the tender notice the court cannot say that the terms of the earlier tender notice would serve the purpose sought to be achieved better than the terms of tender notice under consideration and order change in them, unless it is of the opinion that the terms were either arbitrary or discriminatory or actuated by malice. The provision of the terms inviting tenders from firms having a turnover of more than Rs.20 crores has not been shown to be either arbitrary or discriminatory or actuated by malice."

(v) (2005) 4 Supreme Court Cases 435 [Global Energy Ltd., and another Vs. Adani Exports Ltd and others] wherein the Hon'ble Supreme Court held as follows:

"...

10. The principle is, therefore, well settled that the terms of the invitation to tender are not open to judicial scrutiny and the Courts cannot whittle down the terms of the tender as they are in

the realm of contract unless they are wholly arbitrary, discriminatory or actuated by malice. This being the position of law, settled by a catena of decisions of this Court, it is rather surprising that the learned Single Judge passed an interim direction on the very first day of admission hearing of the writ petition and allowed the appellants to deposit the earnest money by furnishing a bank guarantee or a bankers' cheque till three days after the actual date of opening of the tender. The order of the learned Single Judge being wholly illegal, was, therefore, rightly set aside by the Division Bench."

(vi) (2006) 11 Supreme Court Cases 548 [B.S.N.Joshi & Sons Ltd. Vs. Nair Coal Services Ltd and others] wherein the Apex Court held as follows:

"...

35. In Union of India v. Hindustan Development Corpn. (1993) 3 SCC 499 : AIR 1994 SC 988 [AIR at page 1008], this Court held :

"The 'cartel' is an association of producers who by agreement among themselves attempt to control production, sale and prices of the product to obtain a monopoly in any particular industry or commodity. It amounts to an unfair trade practice which is not in the public interest."

...

59. Recently, in Master Marine Services (P) Ltd. v. Metcalfe & Hodgkinson (P) Ltd and Another, (2005) 6 SCC 138, upon noticing a large number of decisions, this Court stated

"15. The law relating to award of contract by the State and public sector corporations was reviewed in Air India Ltd. v. Cochin International Airport Ltd., (2000) 2 SCC 617 and it was held that the award of a contract, whether by a private party or by a State, is essentially a commercial transaction. It can choose its own method to arrive at a decision and it is free to grant any relaxation for bona fide reasons, if the tender conditions permit such a relaxation. It was further held that the State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision-making process, the court must exercise its discretionary powers under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in

order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should interfere."

[See also Noble Resources Ltd. v. State of Orissa, (2006) 10 SCC 236 : (2006) 9 Scale 181]

60. Strong reliance has been placed by Mr. Tankha on G.J. Fernandez v. State of Karnataka, (1990) 2 SCC 488, wherein this Court observed :

"15. Thirdly, the conditions and stipulations in a tender notice like this have two types of consequences. The first is that the party issuing the tender has the right to punctiliously and rigidly enforce them. Thus, if a party does not strictly comply with the requirements of para III, V or VI of the NIT, it is open to the KPC to decline to consider the party for the contract and if a party comes to court saying that the KPC should be stopped from doing so, the court will decline relief. The second consequence, indicated by this Court in earlier decisions, is not that the KPC cannot deviate from these guidelines at all in any situation but that any deviation, if made, should not result in arbitrariness or discrimination. It comes in for application where the non-conformity with, or relaxation from, the prescribed standards results in some substantial prejudice or injustice to any of the parties involved or to public interest in general. For example, in this very case, the KPC made some changes in the time frame originally prescribed. These changes affected all intending applicants alike and were not objectionable. In the same way, changes or relaxations in other directions would be unobjectionable unless the benefit of those changes or relaxations were extended to some but denied to others. The fact that a document was belatedly entertained from one of the applicants will cause substantial prejudice to another party who wanted, likewise, an extension of time for filing a similar certificate or document but was declined the benefit. It may perhaps be said to cause prejudice also to a party which can show that it had refrained from applying for the tender documents only because it thought it would not be able to produce the document by the time stipulated but would have applied had it known that the rule was likely to be relaxed." (emphasis supplied)

No such case of prejudice was made out by Respondent before the High Court or before us.

61. Law on the similar term has been laid down in Poddar Steel Corpn. v. Ganesh Engg. Works, (1991) 3 SCC 273 in the following terms :

"6. It is true that in submitting its tender accompanied by a cheque of the Union Bank of India and not of the State Bank clause 6 of the tender notice was not obeyed literally, but the question is as to whether the said non-compliance deprived the Diesel Locomotive Works of the authority to accept the bid. As a matter of general proposition it cannot be held that an authority inviting tenders is bound to give effect to every term mentioned in the notice in meticulous detail, and is not entitled to waive even a technical irregularity of little or no significance. The requirements in a tender notice can be classified into two categories those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary with the main object to be achieved by the condition. In the first case the authority issuing the tender may be required to enforce them rigidly. In the other cases it must be open to the authority to deviate from and not to insist upon the strict literal compliance of the condition in appropriate cases."

62. In Indian Rly. Construction Co. Ltd. v. Ajay Kumar, (2003) 4 SCC 579 : 2003 SCC (L&S) 528, this Court explained as to what would amount to bad faith and non-application of mind in regard to exercise of power on the part of the employer. It further opined that the burden would be on the person who seeks to invalidate or nullify the act or order to prove charge of bad faith and abuse or mistake by the authority of its power. It opined that an attempt should be made to balance the conflicting interest."

(vii) (2008) 16 Supreme Court Cases 215 [Siemens Public Communication Networks Private Limited and another Vs. Union of India and others] wherein the Apex Court held as follows:

"...

26. In Jagdish Mandal Vs. State of Orissa, (2007) 14 SCC 517 : (2006) 14 Scale 224, the scope of limited power of judicial review in tender and award of contracts was also lucidly stated in paragraph 19 as follows:

"22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and malafides. Its purpose is to check whether choice or decision is made

'lawfully' and not to check whether choice or decision is 'sound'. When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succor to thousands and millions and may increase the project cost manifold. Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions :

i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone.

OR

Whether the process adopted or decision made is so arbitrary and irrational that the court can say : 'the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached.'

ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226. Cases involving black-listing or imposition of penal consequences on a tenderer/contractor or distribution of state largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action."

the present case, we are of the view that none of the criteria has been satisfied justifying Court's interference in the grant of contract in favour of the appellants. When the power of judicial review is invoked in the matters relating to tenders or award of contracts, certain special features have to be considered. A contract is a commercial transaction and evaluating tenders and awarding contracts are essentially commercial functions. In such cases principles of equity and natural justice stay at a distance. If the decision relating to award of contracts is bonafide and is in public interest, Courts will not exercise the power of judicial review and interfere even if it is accepted for the sake of argument that there is a procedural lacuna."

(viii) (2009) 6 Supreme Court Cases 171 [Meerut Development Authority Vs. Association of Management Studies and another] wherein the Hon'ble Supreme Court held as follows:

"...

41. The distinction between appellate power and a judicial review is well known but needs reiteration. By way of judicial review, the court cannot examine the details of the terms of the contract which have been entered into by the public bodies or the State. Courts have inherent limitations on the scope of any such enquiry. If the contract has been entered into without ignoring the procedure which can be said to be basic in nature and after an objective consideration of different options available taking into account the interest of the State and the public, then the court cannot act as an appellate court by substituting its opinion in respect of selection made for entering into such contract. But at the same time the courts can certainly examine whether 'decision making process' was reasonable, rational, not arbitrary and violative of Article 14. [See: Sterling Computers Ltd. Vs. M & N Publications Ltd., (1993) 1 SCC 445]

...

68. The impugned judgment illustrates "the danger of judges wrongly though unconsciously substituting their own views for the views of the decision maker who alone is charged and authorized by law to exercise discretion." With respect, we find that the High Court virtually converted the judicial review proceedings into an inquisitorial one. The way proceedings went on before the High court suggest as if the High Court was virtually making an inquiry into the conduct and affairs of the MDA in a case where the court was merely

concerned with the decision making process of the MDA in not accepting the offer/tender of the AMS in respect of the disputed plot on the ground that the offer so made was less than that of the reserve price fixed by the MDA."

(ix) (2010) 6 Supreme Court Cases 303 [Shimnit Utsch India Private Limited and another Vs. West Bengal Transport Infrastructure Development Corporation Limited and others] wherein the Hon'ble Supreme Court held as follows:

"...

39. This Court in *Sterling Computers Limited v. M & N Publications Limited & Ors.* (1993) 1 SCC 445, while dealing with judicial review in a matter relating to publication of telephone directories of Mahanagar Telephone Nigam Limited (a Government of India Undertaking) made the following observations :

"12. At times it is said that public authorities must have the same liberty as they have in framing the policies, even while entering into contracts because many contracts amount to implementation or projection of policies of the Government. But it cannot be overlooked that unlike policies, contracts are legally binding commitments and they commit the authority which may be held to be a State within the meaning of Article 12 of the Constitution in many cases for years. That is why the courts have impressed that even in contractual matters the public authority should not have unfettered discretion. In contracts having commercial element, some more discretion has to be conceded to the authorities so that they may enter into contracts with persons, keeping an eye on the augmentation of the revenue. But even in such matters they have to follow the norms recognised by courts while dealing with public property. It is not possible for courts to question and adjudicate every decision taken by an authority, because many of the Government Undertakings which in due course have acquired the monopolist position in matters of sale and purchase of products and with so many ventures in hand, they can come out with a plea that it is not always possible to act like a quasi-judicial authority while awarding contracts. Under some special circumstances a discretion has to be conceded to the authorities who have to enter into contract giving them liberty to assess the overall situation for purpose of taking a decision as to

whom the contract be awarded and at what terms. If the decisions have been taken in bona fide manner although not strictly following the norms laid down by the courts, such decisions are upheld on the principle laid down by Justice Holmes, that courts while judging the constitutional validity of executive decisions must grant certain measure of freedom of "play in the joints" to the executive."

...

53. In *Assn. of Registration Plates Vs. Union of India*, (2005) 1 SCC 679, this Court while dealing with the challenge to the conditions with regard to experience in foreign countries and prescribed minimum turnover from that business observed that these conditions have been framed in the NIT to ensure that the manufacturer selected would be technically and financially competent to fulfill the contractual obligations and to eliminate fly-by-night operators and that the insistence of the State to search for an experienced manufacturer with sound financial and technical capacity cannot be misunderstood. While maintaining the State Government's right to get the right and most competent person, it was held that in the matter of formulating conditions of a tender document and awarding a contract of the nature of ensuring supply of HSRP, greater latitude is required to be conceded to the State authorities and unless the action of tendering authority is found to be malicious and a misuse of statutory powers, tender conditions are unassailable."

(x) (2017) 4 Supreme Court Cases 269 [Reliance Telecom Limited and another Vs. Union of India and another] wherein the Apex Court held as follows:

"...

54. In this context, a passage from *Afcons Infrastructure Ltd. Vs. Nagpur Metro Rail Corpn, Ltd.* (2016) 16 SCC 818 : (2016) 8 Scale 765 is worth reproducing:

"15. We may add that the owner or the employer of a project, having authored the tender documents, is the best person to undertake and appreciate its requirements and interpret its documents. The constitutional courts must defer to this understanding and appreciation of the tender documents, unless there is mala fides or perversity in the understanding or appreciation

or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional courts but that itself is not a reason for interfering with the interpretation given."

(xi)(2017) 4 Supreme Court Cases 318 [Tamil Nadu Generation and Distribution Corporation Limited (TANGEDCO) represented by its Chairman and Managing Director and another Vs. CSEPDIT-Trishe Consortium represented by its Managing Director and another] wherein the Apex Court held as follows:

"...

37. Before parting with the case we are constrained to add something. We do so with immense pain. The respondent, before finalisation of the financial bid submitted series of representations and seeing the silence of the owner it knocked at the doors of the writ Court which directed for consideration of the representations. We are disposed to think that the High Court at that stage should have exercised caution. If the Courts would exercise power of judicial review in such a manner, it is most likely to cause confusion and also bring jeopardy in public interest. An aggrieved party can approach the Court at the appropriate stage, not when the bids are being considered. We do not intend to specify. It is appreciable the owner in certain kind of tenders call the bidders for negotiations to show fairness transparently. But the present case is not one of such nature. Once the price bid was opened, a bidder could not have submitted representations on his own and seek a mandamus from the Court to take certain aspects into consideration. We have stressed this aspect only to highlight the role of the Court keeping in mind the established principle of restraint."

(xii) Un-reported judgment of this Court dated 23.03.2017 made in W.P.No.15777 of 2016 [M/s.Flemingo Duty Free Shop Pvt Ltd rep by its Senior Manager C.Ramesh Vs. Airports Authority of India (Southern Region), represented by its Regional Executive Director] wherein this Court held that no mandamus can be issued in contracts unless there is a clear and cogent material available to show that the decision made by the authorities is an outcome of bias and arbitrary exercise of power.

(xiii) Un-reported judgment of Kerala High Court dated 12.02.2016 made in W.P.(C).No.861 of 2016 (G) [M/s.Flemingo Duty free Shop Pvt. Ltd., A Company registered under the Companies Act, 1956 and having its Registered Office at D-73/1, TTC Ind.Area, MIDC-Turbhe, Navi Mumbai-400 075

represented by its Authorized Signatory M.R.Murali and another Vs. Union of India, Ministry of Civil Aviation, Rajiv Gandhi Bhawan, Safdarjung Airport, New Delhi - 110 003, rep by its Secretary and 3 others] wherein the Kerala High Court held as follows:

"...

13.The learned senior counsel for the petitioners therefore, would submit that there is no separate turnover for the duty free shop to satisfy financial capacity of the fourth respondent. It is to be noted that as contemplated under the NIT, the fourth respondent has produced certificates from a Statutory Auditor. This also forms part of the documents produced by the fourth respondent to prove the financial capacity. The certificate of the Auditor would clearly indicate that the turnover referred as above is an income from the duty free business. No doubt, furnishing the details as regard to the financial capacity is not in the same format as prescribed in the NIT. However, nothing would prejudice anyone in detailing about the nature of the financial capacity by a separate statement. This Court need to look into this matter only through the angle, whether the public instrumentality acted arbitrarily or irrationally in accepting such documents or whether any prejudice has been caused to any other bidders. In this case, all that can be seen is that the Airports Authority was acting to protect the interest of the State rather than to protect any other interest by evaluating two competing proposals of the bidders. Therefore, I do not find any merit in this Writ Petition. The challenge fails and accordingly, the writ petition is dismissed. No costs."

10.Countering the submissions made by the learned senior counsel for the petitioner, Mr.J.Sivanandharaj, learned counsel appearing for the 3rd respondent submitted as follows:

10.1. According to the learned counsel, the Writ Petition is not maintainable and the petitioner cannot seek for a declaration and such a relief can be obtained only from a Civil Court under Section 34 of the Specific Relief Act. The petitioner does not have any legal right and there is no statutory obligation on the authority, therefore, the Court cannot grant a writ of mandamus. The Airports Authority's power to grant a bid to a bidder of its choice and the terms of its tender are drawn only to identify the eligible bidder of its choice as per its requirements. The bid terms in the bid documents are not statutory nor they prescribe any statutory duties. The relief sought for is purely contractual and therefore, is not within the writ jurisdiction of this Court. The Airports Authority is the author of the tender document and hence, they are empowered and competent to

interpret and take a decision. The petitioner has not made out a case of arbitrariness or malafides. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest or to decide the contractual disputes. The appropriate remedy available to the petitioner is to approach a Civil Court and that too, when the disputed and complicated facts are raised in the Writ Petitions. The evidences produced by the petitioner were obtained from unreliable sources and the same are not supported by sufficient information. The petitioner cannot put up a different case from what has been pleaded in the Writ Petitions. There is no Conflict of Interest between the respondents 2 & 3. The relationship mentioned in Clause-2.2.1 (c)(vi) should be a commercial relationship of control and interest and not mere blood relation. Further, it is also to be proved that either or both of them are in a position to have access to each others information and influence each others proposal. The Office of the Bhawar Group is the same as the 3rd respondent or their Telephone Numbers are same etc., are totally immaterial and smacks of malafides. Two concerns or units operated by a husband and wife do not automatically become related persons and do not have mutuality of interest.

10.2. In support of his contentions, the learned counsel relied upon the following judgments:

(i) AIR 1968 SC 292 [Dr. Bool Chand Vs. Chancellor, Kurukshetra University] wherein the Apex Court held as follows:

"...

10. It is true, as pointed out by the Judicial Committee of the Privy Council in A. Francis v. Municipal Councillors of Kuala Lumpur, (1962) 3 All ER 633, that when there has been purported termination of a contract of service, a declaration that the contract of service still subsisted would rarely be made and would not be made in the absence of special circumstances, because of the principle that the Courts do not grant specific performance of contracts of service. The same view was expressed in Barber v. Manchester Regional Hospital Board, (1958) 1 All ER 322 and in Vidyodaya University of Ceylon v. Silva, (1964) 3 All ER 865. In these cases the authority appointing a servant was acting in exercise of statutory authority but the relation between the person appointed and the employer was contractual, and it was held that the relation between the employer and the person appointed being that of master and servant, termination of relationship will not entitle the servant to a declaration that his employment had not been validly determined.

...

21. We agree with the High Court that the appellant had the fullest opportunity of making his

representation and that the enquiry held by the Chancellor was not vitiated because of violation of the rules of natural justice.

22. In the very scheme of our educational set-up at the University level, the post of Vice-Chancellor is of very great importance, and if the Chancellor was of the view, after making due enquiry, that a person of the antecedents of the appellant was unfit to continue as Vice-Chancellor, it would be impossible, unless the plea that the Chancellor acted maliciously or for a collateral purpose is made out, for the High Court to declare that order ineffective. The plea that the Chancellor acted mala fide was raised, but was not pressed before the High Court."

(ii) AIR 1966 SC 334 [Lekhraj Sathramdas Lalvani VS. N.M. Shah, Deputy Custodian cum Managing Officer, Bombay and others] wherein

the Hon'ble Supreme Court held as follows:

"...

6. We pass on to consider the next question presented on behalf of the appellant viz., whether there was a final allotment of the business in favour of the appellant by the Chief Settlement Commissioner. It was contended for the appellant that in view of Ex. P-5 dated April 25, 1956 there was final allotment of the business, though the terms of allotment had to be subsequently determined. In Ex. P-5 the Government of India state that "It has been decided in principle that the aforesaid evacuee concerns should be allotted to you" and the "terms of allotment would be communicated to you separately". Reference was made to Ex. P-8 dated June 21, 1956 wherein it is stated that the Government of India have decided that "the two evacuee concerns viz., firms of Adam Hajee Peer Mohammed Essack and Hajee Ebrahim Kassam Cochinwala of Kozhikode are to be allotted to the present Manager Shri L. S. Lalvani and ultimately sold to him". It is also mentioned in the letter that "until the question of term and conditions of allotment of the concerns is decided Shri Lalvani will continue to function as Custodian's Manager for these concerns in terms of Section 10(2)(b) of the Administration of Evacuee Property Act, 1950 read with Rule 34 of the rules made thereunder". It was submitted on behalf of the appellant that in view of these two letters it must be held that there was a final allotment of the business in favour of the appellant. We do not, however, think there is any justification for this argument. It is

manifest that the terms and conditions of allotment were not finally settled between the parties and there was no concluded contract of sale and, therefore, the appellant had no legal right to the business of the two concerns and the High Court was right in holding that the appellant was not entitled to the grant of a writ in the nature of mandamus with regard to the possession of the two business concerns."

(iii)(1984) 3 Supreme Court Cases 258 [Chingleput Bottlers Vs. Majestic Bottling Company] wherein the Apex Court held as follows:

"...

13. In order that a writ of mandamus may issue to compel the Commissioner to grant the licence, it must be shown that under the Act and the Rules framed thereunder there was a legal duty imposed on the Commissioner to issue a licence under Rule 7 of the Rules without the prior approval of the State Government and that Messrs Majestic Bottling Company had a corresponding legal right for its enforcement. No mandamus will lie where the duty sought to be enforced is of a discretionary nature nor will a mandamus issue to compel the performance by such public body or authority of an act contrary to law. The Commissioner of Prohibition & Excise was under no legal duty to grant a licence to Messrs Majestic Bottling Company till he received the prior approval of the State Government under Rule 7. Even assuming that the Commissioner recommended the grant of a licence, to them under Rule 7, the State Government were under no compulsion to grant such prior approval. The grant or refusal of such licence was entirely in the discretion of the State Government. The High Court had no jurisdiction to issue a writ of Mandamus to the Commissioner to grant a licence to Messrs Majestic Bottling Company contrary to the provisions of Rule 7 of the Rules.

...

16. In our judgment, the High Court exceeded its jurisdiction in issuing a writ of mandamus directing the Commissioner to grant a licence to Messrs Majestic Bottling Company without the prior approval of the State Government as enjoined by Rule 7 of the Rules. The High Court was unduly technical in applying the rules of pleadings. Absence of a specific plea in nature of demurrer would not invest the High Court with jurisdiction to issue a writ of mandamus ordaining the Commissioner to grant a licence to Messrs Majestic Bottling Company under r. 7 of the Rules without the prior approval of the State Government which

was a condition pre-requisite for the grant of such privilege. It is regrettable that the High Court should have short-circuited the whole procedure upon a wrongful assumption of its own powers. The view taken by the High Court is manifestly erroneous. Otherwise, the statutory requirement of such prior approval of the State Government under Rule 7 would be rendered wholly otiose.

17. We should not be understood as laying down an inflexible rule that the High Courts cannot, under any circumstances, regulate or control the manner of grant of a liquor licence by the issue of a writ of mandamus. It would all depend upon the facts and circumstances as to whether the High Court should issue a writ of mandamus or not. The grant of a liquor licence is a matter of privilege. In the very nature of things, the grant or refusal of licence is in the discretion of the State Government. Normally, where the statute vests a discretionary power upon an administrative authority, the Court would not interfere with the exercise of such discretion unless it is made with oblique motives or extraneous purposes or upon extraneous considerations. The present case does not fall within the rule laid down in *K. N. Guruswamy v. The State of Mysore*, (1955) 1 SCR 305 : AIR 1954 SC 592 : 1954 SCJ 644 and *P. Bhooma Reddy v. State of Mysore*, (1969) 3 SCR 14 : (1969) 1 SCC 68 : AIR 1969 SC 655. The decisions in *Guruswamy*, (1955) 1 SCR 305 : AIR 1954 SC 592 : 1954 SCJ 644 and *Bhooma Reddy*, (1969) 3 SCR 14 : (1969) 1 SCC 68 : AIR 1969 SC 655 cases are both in consonance with the well-settled principle that the High Court can always issue a writ of mandamus under Article 226 of the Constitution against a public authority to compel the performance of a public duty where such authority acts in violation of the law."

(iv) (1991) 3 Supreme Court Cases 239 [U.P. State Road Transport Corporation and another Vs. Mohd. Ismail and others] wherein the Apex Court held as follows:

"...

11. The view taken by the High Court appears to be fallacious. The discretion conferred by Regulation 17(3) confers no vested right on the retrenched workmen to get an alternative job in the Corporation. Like all other statutory discretion in the administrative law, Regulation 17(3) creates no legal right in favour of a person in respect of whom the discretion is required to be exercised other than a right to have his case honestly considered for an alternative job by the

Corporation.

12.The High Court was equally in error in directing the Corporation to offer alternative job to drivers who are found to be medically unfit before dispensing with their services. The Court cannot dictate the decision of the statutory authority that ought to be made in the exercise of discretion in a given case. The Court cannot direct the statutory authority to exercise the discretion in a particular manner not expressly required by law. The Court could only command the statutory authority by a writ of mandamus to perform its duty by exercising the discretion according to law. Whether alternative job is to be offered or not is a matter left to the discretion of the competent authority of the Corporation and the Corporation has to exercise the discretion in individual cases. The Court cannot command the Corporation to exercise discretion in a particular manner and in favour of a particular person. That would be beyond the jurisdiction of the Court."

(v)AIR 1967 SC 1753 [G.J.Fernandez Vs. State of Mysore and others] wherein the Hon'ble Supreme Court held as follows:

"...

12.Taking first the contention with respect to the code not being followed in the matter of tenders, the question that arises is whether this Code consists of statutory rules or not. The High Court has observed that the so-called rules in the Code are not framed either under any statutory enactment or under any provision of the Constitution. They are merely in the nature of administrative instructions for the guidance of the department and have been issued under the executive power of the State. Even after having said so, the High Court has considered whether the instructions in the Code were followed in the present case or not. Before however we consider the question whether instructions in the Code have been followed or not, we have to decide whether these instructions have no statutory force. If they have no statutory force, they confer no right on any body and a tenderer cannot claim any rights on the basis of these administrative instructions. If these are mere administrative instructions it may be open to Government to take disciplinary action against its servants who do not follow these instructions but non-observance of such administrative instructions does not in our opinion confer any right on any member of the public like a tenderer to ask for a writ against Government by a

petition under Article 226. The matter may be different if the instructions contained in the Code are statutory rules. Learned counsel for the appellant is unable to point out any statute under which these instructions in the Code were framed. He also admits that they are administrative instructions by Government to its servants relating to the Public Works Department. But his contention is that they are rules issued under Article 162 of the Constitution. Now Article 162 provides that "exec power of a State shall extend to the matters with respect to which the legislature of the State has power to make laws". This Article in our opinion merely indicates the scope of the executive power of the State; it does not 'confer any power on the State Government to issue rules thereunder. As a matter of fact wherever the Constitution, envisages issue of rules it has so provided in specific terms. We may, for example, refer to Article 309, the proviso to which lays down in specific terms that the President or the Governor of a State may make rules regulating the recruitment and the conditions, of service of persons appointed to services and posts under the Union or the State. We are therefore of opinion that Article 162 does not confer any power on the State Government to frame rules and it only indicates the scope of the executive power of the State. Of course, under such executive power, the State can give administrative instructions to its servants how to act in ; certain circumstances; but that will not make such instructions statutory rules which are justiciable in certain circumstances. In order that such executive instructions have the force of statutory rules it must be shown that they have been issued either under the authority conferred on the State Government by some statute or under some provision of the Constitution providing therefore. It is not in dispute that there is no statute which confers any authority on the State Government to issue rules in matters with which the Code is concerned; nor has any provision of the Constitution been pointed' out to us under which these instructions can be issued as statutory rules except Article 162. But as we have already indicated, Article 162 does not confer any authority on the State Government to issue statutory rules. It only provides, for the extent and scope of the executive power of the State Government, and that coincides with the legislative ,power of the State legislature. Thus under Article 162, the State Government can take executive action in all matters in which the legislature of the State can pass

laws. But Article 162 itself does not confer any rule making power on the State Government in that behalf. We are therefore of opinion that instructions contained in the Code are mere administrative instructions and are not statutory rules. Therefore even if there has been any breach of such executive instructions that does not confer any right on the appellant to apply to the court for quashing orders in breach of such instructions. It is unnecessary for us to decide whether there has been in fact a breach of any instruction contained in the Code with respect to tenders and we do not therefore so decide. But assuming that there has been any breach that is a matter between the State Government and its servants and the State Government may take disciplinary action against the servant concerned who disobeyed these instructions. But such disobedience did not confer any right on a person like the appellant, to come to court for any relief based on the breach of these instructions. It is for this reason that we are not referring to the Code, though the High Court did consider whether there was any breach of these administrative instructions and came to the conclusion that there was no breach. In the view we take it is unnecessary for us to consider this, for we are of opinion that no claim for any relief before a court of law can be founded by a member of the public, like the appellant, on the breach of mere administrative instructions."

(vi) 1976 SCC Online Pat 4 [Messers Radha Krishna Agrawal & others Vs. State of Bihar & others] wherein the Patna High Court held as follows:

"...

20. Learned counsel appearing on behalf of the petitioners submitted that, on the facts and in the circumstances of the case, there has been no contravention of the terms of the agreement by the petitioner and as such the order of termination of the lease is void. Now the question is as to whether the allegation regarding the breach of the terms of the agreement, either by the petitioner or by the respondent State can be examined by this Court in exercise of its writ jurisdiction. According to the learned counsel appearing for the petitioners the impugned actions are in exercise of executive powers by the State under Article 298 of the Constitution, which are amenable to the jurisdiction of this court. Whether under the writ jurisdiction such dispute can be agitated and decided has been the subject-matter of controversy. Such disputes can be put under three groups for the purpose of answering the question:

(i) Where a petitioner makes a grievance of breach of promise on the part of the State in cases wherein assurance or promise made by the State he has acted to his prejudice and predicament, but the agreement is short of a contract within the meaning of Article 299 of the Constitution;

(ii) Where the contract entered into between the person aggrieved and the State is in exercise of a power under certain Act or Rules framed thereunder and the petitioner alleges a breach on the part of the State; and

(iii) Where the contract entered into between the State and the person aggrieved is non-statutory and purely contractual and the rights and liabilities of the parties are governed by the terms of the contract, and the petitioner complains about breach of such contract by the State.

21. So far as the cases under categories (i) and (ii) are concerned, it is almost settled that the person aggrieved can invoke the writ jurisdiction of this Court. In *Union of India v. Anglo Afghan Agencies*, (AIR 1968 Supreme Court 718), *Century Spinning and Manufacturing Co. Ltd. v. Ulhasanagar Municipal Council*, (AIR 1971 Supreme Court 1021) and *Robertson v. Minister of Pensions*, ((1949) 1 King's Bench 227), it was pointed out that public bodies are as much bound as private individuals to carry out representations of facts and promises made by them relying on which other persons have altered their position to their prejudice and in such cases even if the contract has not been embodied in the form prescribed, it can be enforced by a writ in appropriate cases in equity. Similarly, in *K. N. Guruswamy v. State of Mysore*, (AIR 1954 Supreme Court 592), *D.F.O. South Kheri v. Ram Sanhi Singh*, (AIR 1973 Supreme Court 205) and *Shree Krishna Gynoday Sugar Ltd. v. State of Bihar*, (AIR 1975 Patna 123), it has been held that, even if the right to relief arose not of an alleged breach of contract, but the action of the authority which was being challenged was of a public authority vested with statutory power, this court, in exercise of its writ jurisdiction, can grant relief to the aggrieved person. On the other hand, in case falling under category (iii), where there is no question of exercise of any statutory power and the rights of the parties flow from mere terms of the contract entered into by the authorities of the State, a party to such agreement should not be allowed to invoke the writ jurisdiction of this

Court for the purpose of finding out as to whether there has been a breach of contract on the part of the State or on the part of such person. It is apparent that in such cases there cannot be adjudication without evidence on the point. There is no question of infraction of any rules or statutes. Courts have always called upon such petitioners to seek their remedy in the Civil Court. In this connection reference can be made to a Bench decision of this Court in B.K.Singh v. State of Bihar, (AIR 1974 Patna 230), where Untwalia, C. J. (as he then was after making a reference to the Supreme Court in Umakant Saran v. State of Bihar, (AIR 1973 Supreme Court 964): and Lekhraj Sathram Das v. N.M.Dab, (AIR 1966 Supreme Court 334) observed;

"Here in the very nature of the contract in question the petitioner had no right to claim its specific performance. The Statute did not impose any legal duty on the authorities concerned that if they thought that the petitioner should not be allowed to complete the work, even assuming they thought so wrongly they could not stop the work. A writ of mandamus cannot issue to compel the authorities to remedy a breach of contract pure and simple."

(vii) (2007) 14 Supreme Court Cases 517 [Jagdish Mandal Vs. State of Orissa and others], wherein the Hon'ble Supreme Court held as follows:

"...

"22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and malafides. Its purpose is to check whether choice or decision is made 'lawfully' and not to check whether choice or decision is 'sound'. When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide actual disputes. The tenderer or contractor

with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succor to thousands and millions and may increase the project cost manifold. Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions :

i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone.

OR

Whether the process adopted or decision made is so arbitrary and irrational that the court can say : 'the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached.'

ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226. Cases involving black-listing or imposition of penal consequences on a tenderer/contractor or distribution of state largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action."

(viii) (1999) 1 Supreme Court Cases 492 [Raunaq International Limited Vs. I.V.R. Construction Ltd., and others], wherein the Hon'ble Supreme Court held as follows:

"...

9. The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are of paramount importance are commercial considerations. These would be :

(1) The price at which the other side is willing to do the work;

(2) Whether the goods or services offered are of the requisite specifications;

(3) Whether the person tendering has the ability to deliver the goods or services as per specifications. When large works contracts involving engagement of substantial manpower or

requiring specific skills are to be offered, the financial ability of the tenderer to fulfil the requirements of the job is also important;

(4) the ability of the tenderer to deliver goods or services or to do the work of the requisite standard and quality;

(5) past experience of the tenderer, and whether he has successfully completed similar work earlier;

(6) time which will be taken to deliver the goods or services; and often

(7) the ability of the tenderer to take follow up action, rectify defects or to give post contract services.

Even when the State or a public body enters into a commercial transaction, considerations which would prevail in its decision to award the contract to a given party would be the same. However, because the State or a public body or an agency of the State enters into such a contract, there could be, in a given case, an element of public law or public interest involved even in such a commercial transaction.

10. What are these elements of public interest ?

(1) Public money would be expended for the purposes of the contract; (2) The goods or services which are being commissioned could be for a public purpose, such as, construction of roads, public buildings, power plants or other public utilities. (3) The public would be directly interested in the timely fulfilment of the contract so that the services become available to the public expeditiously. (4) The public would also be interested in the quality of the work undertaken or goods supplied by the tenderer. Poor quality of work or goods can lead to tremendous public hardship and substantial financial outlay either in correcting mistakes or in rectifying defects or even at times in re-doing the entire work - thus involving larger outlays or public money and delaying the availability of services, facilities or goods. e.g. a delay in commissioning a power project, as in the present case, could lead to power shortages, retardation of industrial development, hardship to the general public and substantial cost escalation.

11. When a writ petition is filed in the High court challenging the award of a contract by a public authority or the State, the court must be satisfied that there is some element of public interest involved in entertaining such a petition.

If, for example, the dispute is purely between two tenderers, the court must be very careful to see if

there is any element of public interest involved in the litigation. A mere difference in the prices offered by the two tenderers may or may not be decisive in deciding whether any public interest is involved in intervening in such a commercial transaction. It is important to bear in mind that by court intervention, the proposed project may be considerably delayed thus escalating the cost far more than any saving which the court would ultimately effect in public money by deciding the dispute in favour of one tenderer or the other tenderer. Therefore, unless the court is satisfied that there is a substantial amount of public interest, or the transaction is entered into mala fide, the court should not intervene under Article 226 in disputes between two rival tenderers.

12. When a petition is filed as a public interest litigation challenging the award of a contract by the State or any public body to a particular tenderer, the court must satisfy itself that party which has brought the litigation is litigating bona fide for public good. The public interest litigation should not be merely a cloak for attaining private ends of a third party or of the party bringing the petition. The court can examine the previous record of public service rendered by the organisation bringing public interest litigation. Even when a public interest litigation is entertained the court must be careful to weigh conflicting public interests before intervening. Intervention by the court may ultimately result in delay in the execution of the project. The obvious consequence of such delay is price escalation. If any re-tendering is prescribed, cost of the project can escalate substantially. What is more important, ultimately the public would have to pay a much higher price in the form of delay in the commissioning of the project and the consequent delay in the contemplated public service becoming available to the public. If it is a power project which is thus delayed, the public may lose substantially because of shortage in electric supply and the consequent obstruction in industrial development. If the project is for the construction of a road, or an irrigation canal, the delay in transportation facility becoming available or the delay in water supply for agriculture being available, can be a substantial set back to the country's economic development. Where the decision has been taken bona fide and a choice has been exercised on legitimate considerations and not arbitrarily, there is no

reason why the court should entertain a petition under Article 226.

13.Hence before entertaining a writ petition and passing any interim orders in such petitions, the court must carefully weigh conflicting public interests. Only when it comes to a conclusion that there is an overwhelming public interest in entertaining the petition, the court should intervene.

14.Where there is an allegation of mala fides or an allegation that the contract has been entered into for collateral purposes, and the court is satisfied on the material before it, that the allegation needs further examination, the court would be entitled to entertain the petition. But even here, the court must weigh the consequences in balance before granting interim orders.

15.Where the decision-making process has been structured and the tender conditions set out the requirements, the court is entitled to examine whether these requirements have been considered. However, if any relaxation is granted for bona fide reasons, the tender conditions permit such relaxation and the decision is arrived at for legitimate reasons after a fair consideration of all offers, the court should hesitate to intervene."

(ix) (2005) 6 Supreme Court Cases 138 [Master Marine Services (P) Ltd. Vs. Metcalfe & Hodgkinson (P) Ltd., and another] wherein the Apex Court held as follows:

"...

12.After an exhaustive consideration of a large number of decisions and standard books on Administrative Law, the Court enunciated the principle that the modern trend points to judicial restraint in administrative action. The Court does not sit as a court of appeal but merely reviews the manner in which the decision was made. The Court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise, which itself may be fallible. The Government must have freedom of contract. In other words, a fairplay in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principles of reasonableness but must be free from arbitrariness not affected by bias or actuated by mala fides. It was also pointed out that quashing

decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

...

15. The law relating to award of contract by State and public sector corporations was reviewed in *Air India Ltd. v. Cochin International Airport Ltd.*, (2000) 2 SCC 617 and it was held that the award of a contract, whether by a private party or by a State, is essentially a commercial transaction. It can choose its own method to arrive at a decision and it is free to grant any relaxation for bona fide reasons, if the tender conditions permit such a relaxation. It was further held that the State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision making process, the Court must exercise its discretionary powers under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The Court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the Court should interfere."

(x) (1972) 2 Supreme Court Cases 36 [State of Orissa and others Vs. Harinarayan Jaiswal and others] wherein the Hon'ble Supreme Court held as follows:

...

13. Even apart from the power conferred on the Government under Sections 22 and 29, we fail to see how the power retained by the Government under clause (6) of its order dated January 6, 1971 can be considered as unconstitutional. As held by this Court in *Cooverjee Bharucha's case* 1954 SCR 873 (supra), one of the important purpose of selling the exclusive right to sell liquor in wholesale or retail is to raise revenue. Excise revenue forms an important part of every State's revenue. The Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. Hence quite naturally, the legislature has empowered the Government to see that there is no leakage in its revenue. It is for the Government to decide whether the price offered in an auction sale is adequate. While accepting or rejecting a bid, it is merely performing an executive function. The correctness of its conclusion is not open to judicial review. We fail to see how the plea of contravention of Article 19(1)(g) or Article 14 can arise in these cases. The Government's power to sell the exclusive privileges

set out in Section 22 was not denied. It was also not disputed that those privileges could be sold by public auction. Public actions are held to get the best possible price. Once these aspects are recognised, there appears to be, no basis for contending that the owner of the privileges in question who had offered to sell them cannot decline to accept the highest bid if he thinks that the price offered is inadequate. There is no concluded contract till the bid is accepted. Before there was a concluded contract, it was open to the bidders to withdraw their bids - see *Union of India and others v. M/s. Bhimsen Walaiti Ram*, (1970) 2 SCR 594. By merely giving bids, the bidders had not acquired any vested rights. The fact that the Government was the seller does not change legal position once its exclusive right to deal with those privileges is conceded. If the Government is the exclusive owner of those privileges, reliance on Article 19(1)(g) or Article 14 becomes irrelevant. Citizens cannot have any fundamental right to trade or carry on business in the properties or rights belonging to the Government, nor can there be any infringement of Article 14, if the Government tries to get the best available price for its valuable rights. The High Court was wholly wrong in thinking that purpose of Sections 22 and 29 of the Act was not to raise revenue. Raising revenue as held by this Court in *Cooverjee Bharucha's case* 1954 SCR 873 (supra) was one of the important purposes of such provisions. The fact that the price fetched by the sale of country liquor is an excise revenue does not change the nature of the right. The sale in question is but a mode of raising revenue. Assuming that the question of arbitrary or unguided power can arise in a case of this nature, it should not be forgotten that the power to accept or reject the highest bid is given to the highest authority in the State i.e. the Government which is expected to safeguard the finances of the State. Such a power cannot be considered as an arbitrary power. If that power is exercised for any collateral purposes, the exercise of the power will be struck down. It may also be remembered that herein we are not dealing with a delegated power but with a power conferred by the legislature.

The High Court erroneously thought that the Government was bound to satisfy the Court that there was collusion between the bidders. The High Court was not sitting on appeal against the order made by the Government. The inference of the Government that there was a collusion among the bidders may be right or wrong. But that was not open to judicial review so long as it is not proved that it was a make-believe

one. The real opinion formed by the Government was that the price fetched was not adequate. That conclusion is taken on the basis of Government expectations. The conclusion reached by the Government does not affect any one's rights. Hence, in our opinion the High Court misapplied the ratio of the decision of this Court in Barium Chemicals Ltd. and another v. Company Law Board and others, 1966 Supp SCR 311 and Rohtas Industries Ltd. v. S.T. Agarwal, (1969) 1 SCC 325."

(xi) (2000) 2 Supreme Court Cases 617 [Air India Ltd. Vs. Cochin International Airport Ltd., and others] wherein the Hon'ble Supreme Court held as follows:

"...

7. The law relating to award of a contract by the State, its corporations and bodies acting as instrumentalities and agencies of the Government has been settled by the decision of this Court in Ramana Dayaram Shetty v. International Airport Authority of India, (1979) 3 SCC 489; Fertilizer Corpn. Kamgar Union (Regd.) v. Union of India, (1981) 1 SCC 568; CCE v. Dunlop India Ltd. (1985) 1 SCC 260 : 1985 SCC (Tax) 75; Tata Cellular v. Union of India, (1994) 6 SCC 651; Ramniklal N. Bhutta v. State of Maharashtra, (1997) 1 SCC 134 and Raunaq International Ltd. v. I.V.R. Construction Ltd., ((1999) 1 SCC 492. The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are of paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the Court can examine the decision making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness. The State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect

is found in the decision making process the Court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The Court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the Court should intervene.

...

11. This narration of facts makes it clear that all along, after the High Level Committee had recommended Cambatta for awarding the contract, what Cambatta was contending was that CIAL having accepted the limited global competitive bidding norms and having decided 28.7.1998 as, the last date for inviting final offer, it was not open to it thereafter to negotiate with Air India behind the back of Cambatta and permit Air India to revise its offer. Even though Cambatta had written protest letters, it had not requested CIAL to give it any opportunity to negotiate or to improve upon its offer. The decision of the High Level Committee was obviously not the final decision and certainly it was not binding on the Board of Directors who were the final authority to take the decision. The Board of Directors, at the meeting held on 7.11.1998. considered the proposals of Air India and Cambatta and appears to have taken a tentative decision to award the contract to Air India and, therefore, called it for negotiations with a view to have better terms and take the final decision. The Board of Directors did take the final decision on 27.11.1998 as Air India agreed to make its offer more beneficial to CIAL. That becomes apparent from Air India's letter dated 1.12.1998. The Board of Directors having taken tentative decision on 7.11.1998 there was no point in calling Cambatta thereafter for any negotiation. It may be recalled that Cambatta was recommended over All India by the High Level Committee only because Cambatta's financial rating was found higher. What is significant to note is that even the High Level Committee had in its minutes noted that financial rating cannot be the sole criterion for taking the final decision. Moreover, in a commercial transaction of such a complex nature a lot of balancing work has to be done while weighing all the relevant factors and the final decision has to be taken after taking an overall view of the transaction. It is true that even though Cambatta had called upon CIAL to produce the minutes of the meeting of the Board of Directors held on

27.11.1998 the same was not made available to Cambatta. But that did not entitle the High Court to draw any adverse inference. The High Court had not called upon CIAL to produce those minutes.

12. As regards the merits of Cambatta's proposal, it was contended by Mr. Andhyarujina that all the three offers of Cambatta were superior in terms of parameters laid down by CIAL than Air India's offer. He submitted that even after CIAL unilaterally raised the license fee of Air India from 17 per cent to 20 per cent in the 10th year to match Cambatta's offer and imposed a condition that Air India would not sub-contract, it did not become comparable with the offer of Cambatta as Air India did not offer to pay 2 per cent bonus in license fee. It was also submitted that Air India's representation that it would be able to bring more traffic was illusory and for that reason also Air India's proposal cannot be regarded as superior or even comparable with the proposal of Cambatta. We do not think that CIAL did any wrong in taking into consideration the fact that Air India is an airline and being a national carrier would be in a position to bring more traffic of Air India and other domestic lines if it was awarded the contract. As regards the merits of the rival offers, we do not think it proper to look at only the financial aspect and hold that CIAL did not accept Cambatta's offer, even though it was better, because it wanted to favour Air India or that it had acted under the influence of Air India and the Ministry of Civil Aviation. In a commercial transaction of a complex nature what may appear to be better, on the face of it, may not be considered so when an overall view is taken. In such matters the Court cannot substitute its decision for the decision of the party awarding the contract. On the basis of the material placed on record we find that CIAL bona fide believed that involving a public sector undertaking and a national carrier would, in the long run, prove to be more beneficial to CIAL. For all these reasons it is not possible to agree with the finding of the High Court that CIAL had acted arbitrarily and unreasonably and was also influenced by extraneous considerations during its decision making process."

(xii) (2012) 8 Supreme Court Cases 216 [Michigan Rubber (India) Ltd., v. The State of Karnataka and Others] wherein the Hon'ble Supreme Court held as follows:

https://hcservices.ecourts.gov.in/hcservices/ 23. From the above decisions, the following

principles emerge:

(a) the basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

(b) fixation of a value of the tender is entirely within the purview of the executive and courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by Courts is very limited;

(c) In the matter of formulating conditions of a Tender Document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of tendering authority is found to be malicious and a misuse of its statutory powers, interference by Courts is not warranted;

(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and

(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by Court is very restrictive since no person can claim fundamental right to carry on business with the Government.

24) Therefore, a Court before interfering in tender or contractual matters, in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone; or whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached"; and

(ii) Whether the public interest is affected?

If the answers to the above questions are in negative, then there should be no interference under Article 226.""

(xiii) (2011) 4 Supreme Court Cases 756 [THDC India Limited Vs. Voith Hydro GMBH Company and another] wherein the Apex Court held as follows:

"...

32. We may reiterate at the cost of repetition that by judgment and order dated 26.03.2010 passed by this Court, this Court had clearly expressed that the contractual rights of the competing parties like Voith GMBH (Respondent 1) and Alstom (Respondent 2) were not more important than the national interest. If we find that in pursuance of the national interest, which was so explicitly mentioned in this Court's judgment dated 26.03.2010, THDC by adopting a fair and transparent procedure, provided a level playing field to both the parties to get a proper idea of costs that it would have to pay to the party winning the contract, no complaint could be made of the breach of the contractual rights. In our opinion, firstly, there is no breach of the contractual rights or the terms of ITB. After all, it could not be said that the rights of the parties were crystallised.

...

34. If the facts are viewed from this angle, then it will be clear that there was nothing wrong in THDC treading its course with utmost care and it must be said that the facts show that THDC appears to have acted in favour of the national interest by trying to prevent the exorbitant prices for the project and further trying to go to the realistic and minimum price. That was the spirit of this court's judgment dated 26.03.2010 too. In that view, we do not think that the High Court was right in passing the stay order as it did. This was a clear effort on the part of Voith GMBH (Respondent 1) to put the spoke and to bring to halt the motion of the process which was ordered by this Court in its judgment dated 26.03.2010."

(xiv) (1974) 4 Supreme Court Cases 3 [E.P. Royappa Vs. State of Tamil Nadu and another] wherein the Apex Court held as follows:

"...

92. Secondly, we must not also overlook that the burden of establishing mala fides is very heavy on the person who alleges it. The allegations of mala fides are often more easily made than proved, and the very seriousness of such allegations demands proof of a high order of credibility. Here the petitioner, who was himself once the Chief

Secretary, has flung a series of charges of oblique conduct against the Chief Minister. That is in itself a rather extra-ordinary and unusual occurrence and if these charges are true, they are bound to shake the confidence of the people in the political custodians of power in the State, and therefore, the anxiety of the Court should be all the greater to insist on a high degree of proof. In this context it may be noted that top administrators are often required to do acts which affect others adversely but which are necessary in the execution of their duties. These acts may land themselves to misconception and suspicion as to the bona fide of their author when the full facts and surrounding circumstances are not known. The Court would, therefore be slow to draw dubious inferences from incomplete facts placed before it by a party,, particularly when the imputations are grave and they are made against the holder of an office which has a high responsibility in the administration. Such is the judicial perspective in evaluating charges of unworthy conduct against ministers and other high authorities, not because of any special status which they are supposed to enjoy, nor because they are highly placed in social life or administrative set up these considerations are wholly irrelevant in judicial approach but because, otherwise, functioning effectively would become difficult in a democracy. It is from this stand point that we must assess that merits of the allegations of mala fides made by the petitioner against the second respondent.

93. Now extensive arguments were addressed before us by counsel on both sides and we were taken through a mass of documents, papers and official notings on this part of the case but we are afraid it is not possible for us to say that the onus of establishing mala fides against the second respondent, heavy as it is, has been discharged by the petitioner. The allegations of mala fides have been dealt with fully in the judgment of the learned Chief Justice and we do- not think it will serve any useful purpose for us to discuss the merits of those allegations once again in this judgment, as we are substantially in agreement with what the learned Chief Justice has said. But we cannot help mentioning that there are certain disturbing features which cause us anxiety. We may take by way of example the imputation in regard to the Cooum River Project. It seems that in or about the beginning of February, 1970 the second respondent asked the Director of Vigilance to look into the affairs relating to Cooum Improvement project as he apprehended that there were certain

malpractices in the execution of that scheme. Whether this was done by the second respondent on his own initiative or at the instance of the petitioner is immaterial and we need not go into that controversy. The Director of Vigilance, as his subsequent letter dated February 25, 1970 shows informed the second respondent that without a discreet inquiry it would not be possible to allay or confirm the apprehensions with any degree of credibility since the head of the concerned engineering department was personally involved in the execution of the scheme and he accordingly by that letter pointed out to the petitioner that he needed authorisation to embark on the inquiry and Government order in that behalf should therefore be obtained and communicated to him. The petitioner made an endorsement on this letter on the very next day with a remark that the Public (Secret/Confidential) Department should deal with it immediately. The Public (Secret/Confidential) Department prepared a note at the foot of the letter and submitted it for circulation to the Minister for Works and the second respondent for orders whether the Director of Vigilance should be requested to make a discreet inquiry and send his report. The endorsement made below the note shows that it was submitted for circulation on March 3, 1970. It appears, however, that this note remained unattended until the middle of September 1970. On September 12, 1970 the Minister for Works made an endorsement that the Director of Vigilance may make a discreet inquiry and this endorsement was approved by the second respondent on September 20, 1970. The file containing the note together with the endorsements of the Minister for works and the second respondent was thereafter placed before the petitioner along with a draft of the memorandum to be addressed by the petitioner to the Director of Vigilance. It is common ground that no memorandum in terms of this draft was issued by the petitioner to the Director of Vigilance. The case of the petitioner was that he did not do so because the second respondent subsequently ordered that no inquiry need be made in this matter. This position was disputed by the second respondent who stated that to the best of his recollection he did not make any such order cancelling the inquiry. That is a matter of controversy between the parties and as pointed out above it does not fall within our province to investigate it. But the fact remains, and that cannot be disputed, that no inquiry thereafter took place in the affairs of the Coom Improvement Scheme. It is a little interesting to note that Sabanayagam addressed a letter dated July

31, 1971 to the petitioner stating that though the Personal Assistant to the Chief Secretary had been reminded to send back the file relating to this matter, it had not been received and the petitioner should arrange to send it back, if it was with him. The petitioner immediately replied to this letter on August 8, 1971 pointing out that he distinctly remembered that the second respondent had subsequently ordered that no inquiry need be made in this matter and the file was not with him. It is significant that though the petitioner stated categorically that the second respondent had subsequently ordered that no inquiry need be made, Sabanayagam did not write back challenging the correctness of this statement. The file pertaining to this matter was all throughout in the possession of the Government and even after the petitioner pointed out that it was not with him, curiously enough, it could not be traced until the filing of the petition. In fact, the absence of the Me could not have stood in the way of ordering an inquiry. These and a few other circumstances do create suspicion but suspicion cannot take the place of proof and, as pointed out above, proof needed here is high degree of proof. We cannot say that evidence generating judicial certitude in upholding the plea of mala fides has been placed before us in the present case. We must, therefore, reject this contention of the petitioner as well."

(xv) AIR 1966 SC 644 [Ram Kishore Sen and others and Union of India and others] wherein the Apex Court held as follows:

"...

14. The learned Judge was not impressed by these arguments and we think, rightly. It is true that the official maps in regard to the area with which we are concerned are not easy to secure. It is not, however, possible to accept the theory that they have been deliberately withdrawn from the market. In fact, during the course of the hearing of the writ petition, the appellants themselves produced two maps Exts. A-7 and A-8. Besides, as the learned Judge points out, when the case was first argued before him, the learned Attorney-General appearing for the respondents produced most of the maps relied upon by him, and the learned Judge directed that they should be kept on the record to enable the appellants to take their inspection. Under these circumstances, we do not see how the appellants can complain that the respondents have suppressed evidence, or can ask the Court to hold that the onus was on the respondents to prove that the relevant provisions

of the Amendment Act can be implemented. The onus must primarily lie on the appellants to show that what is attempted to be done by the respondents in pursuance of the provisions of the Amendment Act is illegal or unconstitutional; and if they are not able to produce evidence in support of their plea, they cannot require the respondents to show that the plea made by the appellants is untenable. The location of the villages in the different Thanas cannot be regarded as a matter within the exclusive knowledge of the respondents and in any case, it has to be proved by the production of reliable maps. Both parties have produced maps; and the learned trial Judge has refused to accept the maps produced by the appellants as reliable and has treated the maps produced by the respondents as worthy of credence. Under these circumstances, no question of onus really arises."

(xvi) (2004) 11 Supreme Court Cases 213 [Delhi Development Authority and another Vs. UEE Electricals Engg. (P) Ltd., and another] wherein the Apex Court held as follows:

"...

16. Doubtless, he who seeks to invalidate or nullify any act or order must establish the charge of bad faith, an abuse or a misuse by the authority of its powers. While the indirect motive or purpose, or bad faith or personal ill-will is not to be held established except on clear proof thereof, it is obviously difficult to establish the state of a man's mind, for that is what the employee has to establish in this case, though this may sometimes be done. The difficulty is not lessened when one has to establish that a person apparently acting on the legitimate exercise of power has, in fact, been acting mala fide in the sense of pursuing an illegitimate aim. It is not the law that mala fide in the sense of improper motive should be established only by direct evidence. But it must be discernible from the order impugned or must be shown from the established surrounding factors which preceded the order. If bad faith would vitiate the order, the same can, in our opinion, be deduced as a reasonable and inescapable inference from proved facts. (See S. Pratap Singh v. The State of Punjab, AIR 1964 SC 72 : (1964) 4 SCR 733). It cannot be overlooked that burden of establishing mala fides is very heavy on the person who alleges it. The allegations of mala fides are often more easily made than proved, and the very seriousness of such allegations demands proof of a high order of credibility."

(xvii)Un-reported judgment dated 23.03.2017 made in W.P.No.15777 of 2016 [M/s.Flemingo Duty Free Shop Pvt Ltd rep by its Senior Manager C.Ramesh Vs. Airports Authority of India (Southern Region), represented by its Regional Executive Director and 2 others] wherein this Court held as follows:

"...

15. Even though the petitioner has filed separate reply affidavit to the counter affidavit of the respondents 1 and 3 as well as the second respondent, in the reply, the petitioner, while denying the various averments made in the counter affidavits, has not chosen to deny the specific allegations raised by the second respondent with respect to the punishment suffered by the petitioner on 26.02.2010 and on 13.09.2013. The reply affidavit of the petitioner is silent in this regard. Therefore, this Court can only take an adverse inference to the pleadings raised by the petitioner as regards the ineligibility of the second respondent. Furthermore, as regards the eligibility of the second respondent, the first respondent in the counter has specifically enlisted the terminals/ports in which the second respondent is carrying on business of supply of duty free goods to crew and passengers. Further, the first respondent in the counter affidavit has categorically indicated that the second respondent is eligible to participate in the tender in all respects and the documents submitted by the second respondent were also subjected to scrutiny by a committee consisting of experts. In such circumstances, this Court cannot, in this writ petition, cannot adjudicate the disputed facts pleaded by the petitioner on the one hand and the respondents 1 and 2 on the other and come to a conclusion that the averments of the petitioner as regards ineligibility of the second respondent to participate in the tender are sustainable. To be precise, the disputed questions of facts cannot be adjudicated by this Court in exercise of the powers conferred under Article 226 of The Constitution of India.

...

17.Above all, this Court is of the view that while adjudicating the disputes involving contractual obligations or disputes, this Court has to exercise refrain. The judicial review exercisable by this Court is limited to find out as to whether the decision arrived at by the respondents is arbitrary, malafide and capricious which has resulted in miscarriage of justice. Though in this writ petition the petitioner has pleaded malafide acts on the part of the first respondent in awarding the contract in favour of

the second respondent, the petitioner did not array the first respondent in his personal capacity or proved the specific nature of favouritism as against the first respondent. It is well settled that merely making allegations of malafide is not sufficient and the person who makes such allegation has equally an obligation to prove those allegations to the satisfaction of the Court. In this case, the petitioner has merely raised allegations of favouritism on the part of the first respondent but failed to prove the same.

...

22. Applying the decision rendered by the Honourable Supreme Court mentioned above to the facts of this case, the petitioner repeatedly harped upon the ineligibility of the second respondent to participate in the tender process, which was denied by the second respondent by contending that they are eligible. The first respondent in the counter affidavit pleaded that the eligibility or otherwise of the tenderers have been scrutinised by a committee constituted by it and the committee consists of expert in the technical field. While so, as mentioned by the Honourable Supreme Court, this Court does not have the expertise to correct the administrative decision and if a review of the administrative decision is permitted, it will amount to substituting it's own decision without the necessary expertise, which itself may be fallible. Therefore, this Court is of the considered view that the eligibility or otherwise of the second respondent has been determined by a committee consisting of experts and the decision taken by such committee does not call for interference by this Court."

11. The learned counsel appearing for the 3rd respondent submitted that two concerns/units operated by a husband and wife do not automatically become related persons and cannot automatically assume mutuality of interest. Further, the learned counsel submitted that one entity controlled by the husband and one entity controlled by the wife had the following commonalities: purchase orders of one raised in the name of another, one involved in the other's negotiations, one signed correspondence for another, one listed as person providing technical assistance to another, address of one entity given as the residential address of the couple, the couple had a joint bank account, the computer and xerox machine of one found in the premises of the other, etc. However, when the two entities had separate office premises, bank accounts, separate registrations and separate sets of employees, the Courts have held that two entities were not related persons.

11.1. In support of his contention, the learned counsel relied upon the following judgments:

(i) (1984) 3 Supreme Court Cases 575 [Union of India and others Vs. ATIC Industries Ltd.]

(ii) (2002) 9 Supreme Court Cases 555 [Commissioner of Central Excise, Mumbai Vs. Fisher Rosemount (India) Ltd.]

(iii) (2002) 9 Supreme Court Cases 463 [Alembic Glass Industries Ltd. Vs. Collector of Central Excise & Customs]

(iv) (2003) 2 Supreme Court Cases 86 [Flash Laboratories Ltd. Vs. Collector of Central Excise, New Delhi]

(v) (2008) 1 Supreme Court Cases 382 [Commissioner of Customs, Bangalore Vs. Acer India (P) Ltd.]

(vi) 2010 (179) ECR 303 (Madras) : 2010 (255) ELT3 (Mad.) [Dagger Die Cutting rep by its Sole Proprietrix Mrs. Rukhsana Deshpande Vs. The Commissioner of Central Excise, Commissionerate and The Customs, Excise and Gold (Control) Appellate Tribunal].

12. On a careful consideration of the materials available on record and the submissions made by the learned counsel on either side and also the judgments relied upon by the learned counsel appearing for the respective parties, it could be seen that the only issue involved in the Writ Petition in W.P.No.7252 of 2017 is with regard to Clause-2.2.1(c)(vi) of the Request For Proposal. According to the petitioner, Mumta Lunked, the Sole Proprietrix of the 3rd respondent is the sister-in-law of Sunil Kumar, the Director of the 2nd respondent Firm. The respondents 2 & 3 were running their business in the same address, having same telephone number and mobile number and therefore, there was Conflict of Interest between the respondents 2 & 3 as envisaged in Clause-2.2.1 (c)(vi) of the RFP. It would be relevant to extract Clause-2.2 of the RFP, which reads as follows:

2.2 Eligibility of Bidders

2.2.1 For determining the eligibility of Bidders for their short-listing here under, the following shall apply:

(a) The Bidder may be a single entity or a group of entities (the "Consortium"), coming together to implement the Concession. However, no entity submitting a Proposal individually or as a member of a Consortium, as the case may be, can be a member of another Bidder. The term Bidder used herein would apply to both a single entity and a Consortium.

(b) A Bidder may be a natural person, a legal entity or any combination of them with a formal intent to enter into an agreement or under an existing agreement to form a Consortium. A Consortium shall be eligible for consideration subject to the conditions set out in RFP.

(c) A Bidder shall not have a conflict of interest

(the "Conflict of Interest") that affects the Bidding Process. A Bidder found to have a Conflict of Interest shall be disqualified. A Bidder shall be deemed to have a Conflict of Interest affecting the Bidding Process, if:

(i) the Bidder, its Member or Associate (or any constituent thereof) and any other Bidder, its Member or any Associate thereof (or any constituent thereof) have common controlling shareholders or other ownership interest; provided that this disqualification shall not apply in cases where the direct or indirect shareholding of a Bidder, its Member or an Associate thereof (or any shareholder hereof having a shareholding of more than 5 per cent of the paid up and subscribed share capital of such Bidder, Member or Associate, as the case may be) in the other Bidder, its Member or Associate is less than 5 per cent of the subscribed and paid up equity share capital thereof; provided further that this disqualification shall not apply to any ownership by a bank, Insurance company, pension fund or a public financial institution referred to in of the Companies Act, 1956/2013 or as amended from time to time. For the purposes of this Clause 2.2.1(C), indirect shareholding held through one or more intermediate persons shall be computed as follows:

(aa) where any intermediary is controlled by a person through management control or otherwise, the entire shareholding held by such controlled intermediary in any other person (the "Subject Person") shall be taken into account for computing the shareholding of such controlling person in the Subject Person; and

(bb) subject always to sub-clause (aa) above, where a person does not exercise control over an intermediary, which has shareholding in the Subject Person, the computation of indirect shareholding of such person in the Subject Person shall be undertaken on a proportionate basis; provided, however, that no such shareholding shall be reckoned under this sub-clause (bb) if the shareholding of such person in the intermediary is less than 26% of the subscribed and paid up equity shareholding of such intermediary; or

(ii) a constituent of such Bidder is also a constituent of another Bidder; or

(iii) The Authority has direct or indirect shareholding in the Bidder or its Consortium Member; or

(iv) such Bidder, or any Associate thereof

receives or has received any direct or indirect subsidy, grant, concessional loan or subordinated debt from any other Bidder, or any Associate thereof or has provided any such subsidy, grant, concessional loan or subordinated debt to any other bidder, its Member or any Associate thereof; or

(v) such Bidder has the same legal representative for purposes of this Proposal as any other Bidder; or

(vi) such Bidder, or any Associate thereof has a relationship with another Bidder, or any Associate thereof, directly or through common third party/parties, that puts either or both of them in a position to have access to each other information about, or to influence the Proposal of either or each other; or

(vii) such Bidder or any Associate thereof has participated as a consultant to Authority in the preparation of any documents, design or technical specifications of the Concession.

(d) A Bidder shall be liable for disqualification if such Bidder or its Associate(s) has any amounts including interest outstanding and payable to Authority (the "Outstanding Dues") as on 30.09.2016. Outstanding Dues in respect of a contract shall mean to include any amounts including interest payable to the Authority (or any entity having shares held by the Authority) exceeding one month's license fee or Security Deposit (whichever is higher) in respect to such contract, unless such payments have been expressly excused of stayed on or before date of publication of RFP by a judicial Court/Tribunal. In this respect, the Bidder shall produce No Dues Certificate from the Authority (or any entity having shares held by the Authority) with the Proposal. The Applicant should also submit the details of contracts held (current and past), if any, at all AAI controlled airports, in the format as set forth in Annex-4 of Form-I. The decision of the Authority in respect of Outstanding Dues shall be final and binding on the Bidder.

In respect of disputed amounts under the consideration of Arbitrator, the disputed amounts shall not be considered Outstanding Dues, provided the Bidder has furnished a Bank Guarantee covering 50% to the disputed amount. The Bank Guarantee to be valid till the arbitration award. Proof to this effect has to be submitted along with other technical documents.

(e) A Bidder shall be liable for disqualification if any legal, financial or technical adviser of the Authority in relation to the Concession is

engaged by the Bidder, its Member or any Associate thereof, as the case may be, in any manner for matters related to or incidental to the Concession. For the avoidance of doubt, this disqualification shall not apply where such adviser was engaged by the Bidder, its Member or Associate in the past but its assignment expired or was terminated 6 (six) months prior to the date of issue of this RFP. Nor will this disqualification apply where such adviser is engaged after a period of 7 (seven) years from the date of execution of the Concession Agreement.

(f) Any entity which has been barred by the Central/State Government, or any entity controlled by it, from participating in any project, and the bar subsists as on the date of bidding, would not be eligible to submit a proposal, either individually or as member of a Consortium.

(g) A Bidder including any Consortium Member or Associate should, in the last 3 (three years), have neither failed to perform on any contract, as evidenced by imposition of a penalty by an arbitral or judicial authority or a judicial pronouncement or arbitration award against the Bidder, Consortium Member or Associate thereof, as the case may be, nor has been expelled from any project or contract by any public entity nor have had any contract terminated by any public entity for breach by such Bidder, member of a Consortium or Associate thereof."

12.1. In the case on hand, though the petitioner had contended that the respondents 2 & 3 are closely related, the 3rd respondent in their counter have stated that the 2nd respondent was planted by the petitioner for the purpose of maintaining the Writ Petitions. The respondents 1, 4 & 5 contended that there is no corporate relationship between the respondents 2 & 3 and therefore, the bar under Clause-2.2.1(c) (vi) of RFP shall not prevent the respondents 2 & 3 from participating in the bidding process.

12.2. On a reading of Clause-2.2.1(c) (vi) of the RFP, it is clear that a Bidder, who has a relationship with another Bidder directly or through common third party that puts either or both of them in a position to have have access to each other information about or to influence the proposal of either or each other, shall be deemed to have a Conflict of Interest affecting the bidding process. In the case on hand, the petitioner produced the documents to establish that the respondents 2 & 3 were having common Consultant, who had quoted the 3rd respondent's Account ID for depositing the Earnest Money Deposit with the Airports Authority of India, while depositing the EMD of the 2nd respondent. In these circumstances, the 2nd respondent's bid was rejected since the

2nd respondent's Account ID was not furnished by the Consultant for depositing the EMD. Therefore, it is clear that the Consultant had knowledge about the Account ID of both the respondents viz., respondents 2 & 3. Subsequently, the Consultant had written a letter to the Tendering Authority regretting for the mistake committed by them. In the letter dated 19.12.2016, the Consultant had stated that they were engaged by the 2nd respondent viz., Bhawar Lifestyle to assist them with e-tendering of the tender process and that they were also supporting other Client and by mistake, they have supplied the wrong RTGS challan to Bhawar Lifestyle, which was meant for another client (i.e.) the 3rd respondent, Evolve Business Ventures.

12.3. It is also evident from the Power of Attorney dated 28.11.2016 produced by the 1st respondent that the 3rd respondent Proprietrix's address has been mentioned as 91, Model House Road, Basavanagudi, Bangalore-04. In page-18 of the additional typed set of papers produced by the petitioner, in the Website of the Bhawar Group, the very same address has been mentioned as the address of the Bhawar Group of Companies. That apart, in the Website of the Bhawar Group, which has been enclosed at page-264 of the typed set of papers produced by the petitioner, another address viz., No.6/3, Krishna Rao Road, Basavanagudi, Bangalore-560004 has been mentioned. The very same address has been mentioned in the Balance Sheet of the 3rd respondent dated 25.09.2015, which document has been produced by the 1st respondent at page-33 of their typed set of papers. That apart, the 3rd respondent has also mentioned the very same Telephone Number (i.e) 41466395 in the Bhawar Group Website at page-264 of the petitioner's typed set and also in the Balance Sheet enclosed at page-33 of the 1st respondent's typed set. The address mentioned in the Website of the Bhawar Group tallies with the address mentioned in the Balance Sheet of the 3rd respondent and also in the Form ST-2 issued by the Central Board of Excise and Customs. Even in the Form ST-2, the address mentioned in the Website of the Bhawar Group has been mentioned as the address of the 3rd respondent's business premises. In the additional affidavit, the 3rd respondent has stated that the address in No.6/3, Krishna Rao Road, Basavanagudi, Bangalore-560004 is common to respondents 2 & 3 and the 3rd respondent were having a small sales office and that have been closed down in April 2016.

12.4. The contention of the 3rd respondent cannot be believed for the reason that in all the correspondences to the Airports Authority of India with respect to the tender process, the very same address has been printed in the letter heads of the 3rd respondent. When the 3rd respondent themselves have mentioned the very same address of the 2nd respondent, they cannot now disown and say that they have no links with the 2nd respondent. In spite of the petitioner raising objections to the Airports Authority of India with regard to the close relationship between the Sole Proprietrix of the 3rd

respondent and the Director of the 2nd respondent, the 3rd respondent, for the reasons best known to them, have stated that the 2nd respondent was planted by the petitioner. The reason for suppressing the relationship between the Proprietrix of the 3rd respondent and the Director of the 2nd respondent has not been explained by the 3rd respondent. The suppression of this fact has been done only to get over the bar under Clause-2.2.1(c)(vi) of the RFP. The 3rd respondent has not come out with a clear stand to establish their case.

12.5.As per Clause-2.2.1(c)(vi), it is clear that a bidder who has a relationship with another bidder directly or through a common third party that puts either or both of them in a position to have access of each other information about or to influence the proposal of either or each other shall be deemed to have conflict of interest affecting the bidding process. Therefore, from the above, I am of the view that the relationship between two bidders need not necessarily be corporate relationship, but a close relationship of two bidders that puts either or both of them in a position to have access of each other information about or to influence the proposal of either or each other, shall be deemed to have Conflict of Interest. In Clause-2.2.1(c)(vi), the authority has not mentioned about the corporate relationship. The main criteria under Clause-2.2.1(c)(vi) is whether either or both of the bidders are in a position to have access of each other information about or to influence the proposal of either or each other. In the case on hand, the respondents 2 & 3, being close relatives and were carrying on business in the same premises and also have engaged a common Consultant, who had mistakenly mentioned the Account ID of the 3rd respondent in the 2nd respondent's EMD Challan, would establish that the respondents 2 & 3 were in a position to have access to each other information about or to influence the proposal of either or each other in the bidding process, which is a conflict of interest affecting the bidding process.

12.6.So far as the contention of the Airports Authority of India is concerned that only corporate relationship shall be taken as conflict of interest cannot be accepted for the reason that the term "Associate" has been defined in the RFP as follows:

"Associate" shall mean, in relation to the Bidder/Consortium Member, a person who controls, is controlled by, or is under the common control with such Bidder/Consortium Member (the "Associate"). As used in this definition, the expression "control" means, with respect to any person which is a company or corporation, the ownership directly or indirectly, of at least 75% (Seventy Five percent) of the voting shares of such person, and with respect to a person which is not a company or corporation, the power to direct the management and policies of such person by operation of law."

Similarly, the Bidder has been defined in the RFP as

"The Bidder shall mean a sole entity or a Consortium of entities, submitting a proposal pursuant to the RFP". Therefore, even a sole entity (i.e.) an individual is entitled to participate in the tender process.

12.7. It is not that the Tendering Authority is at liberty to set out the conditions/eligibility criteria to suit their tender process. However, the tender conditions and eligibility criteria should be followed scrupulously by the Tendering Authority without any deviation whatsoever.

12.8. The Court, before interfering in tender or contractual matters, in exercise of its power of judicial review, should satisfy itself whether the process adopted or decision made by the authority is mala fide or intended to favour someone or whether the process adopted or decision made is so arbitrary and irrational that the Court can say that the decision was such that no responsible authority acting reasonably and in accordance with relevant law could have reached and whether the public interest is affected.

12.9. The terms of invitation to the tender cannot be open to judicial scrutiny because invitation to the tender is at the realm of contract. This Court is aware of the position that restraint under judicial review is always limited to this Court and it has to be invoked rarely and hesitantly under Article 226 of the Constitution of India.

12.10. But, in the case on hand, when Clause-2.2.1(c)(vi) of RFP has been violated, this Court has no other option, except to interfere in the tender process. The basic requirement of Article 14 is fairness in action by the Tendering Authority and no arbitrariness in essence and substance is the heartbeat of fair play. While exercising the power of judicial review in respect of contracts entered into on behalf of the State, the Court is concerned primarily as to whether there has been infirmity in the decision making process. The Courts can certainly examine whether the decision making process was reasonable, rational, not arbitrary and violative of Article 14 of the Constitution. The Tendering Authority has the public duty to be fair to all concerned. The Tendering Authority is bound to adhere to the criteria, standards and procedures laid down by them and cannot depart from them arbitrarily.

12.11. So far as the judgments relied upon by the learned counsel for the 3rd respondent that even husband and wife do not automatically become related persons and cannot automatically assume mutuality of interest is concerned, the said proposition has been laid down in the judgments pertaining to the Central Excise matters. The said proposition

is applicable to a case under Central Excise Act and cannot be applied to the tender process, which bars two close relatives participating in the tender process as per Clause-2.2.1(c)(vi) of the RFP.

13. In these circumstances, applying the bar under Clause-2.2.1(c)(vi) of RFP, since the bids submitted by the 3rd respondent is contrary to the tender condition of RFP dated October 2016, the same is liable to be set aside.

14. So far as the Writ Petition in W.P.No.7251 of 2017 is concerned, the petitioner has filed the Writ Petition to issue a Writ of Mandamus forbearing the 1st respondent from awarding the Letter of Award to the 3rd respondent and consequently award the same to the petitioner, being the highest bidder, post disqualification of 3rd respondent at the technical evaluation stage. Since it was brought to the notice of this Court that the Tendering Authority had awarded the tender as early as on 04.03.2017 itself and that the Writ Petition was filed only after the award of the tender (i.e.) on 22.03.2017, the relief sought for in the Writ Petition has become infructuous even on the date of filing of the Writ Petition.

15. The bid submitted by the 3rd respondent is declared as contrary to the tender conditions of RFP dated October 2016. In the interest of justice, the respondents 1, 4 & 5 are at liberty to call for fresh tender and conduct the tender process in accordance with law following the terms and conditions of the tender without any deviations whatsoever.

16. With these observations, the Writ Petition in W.P.No.7252 of 2017 is allowed. The Writ Petition in W.P.No.7251 of 2017 is dismissed as infructuous. No costs. Consequently, the connected miscellaneous petitions are closed.

Sd/-
सत्यमेव जयते

Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

va

To

1. Regional Executive Director,
Airports Authority of India (Southern Region),
Office of Regional Executive Director,
Operational Offices, Southern Region,
Chennai - 600 027.

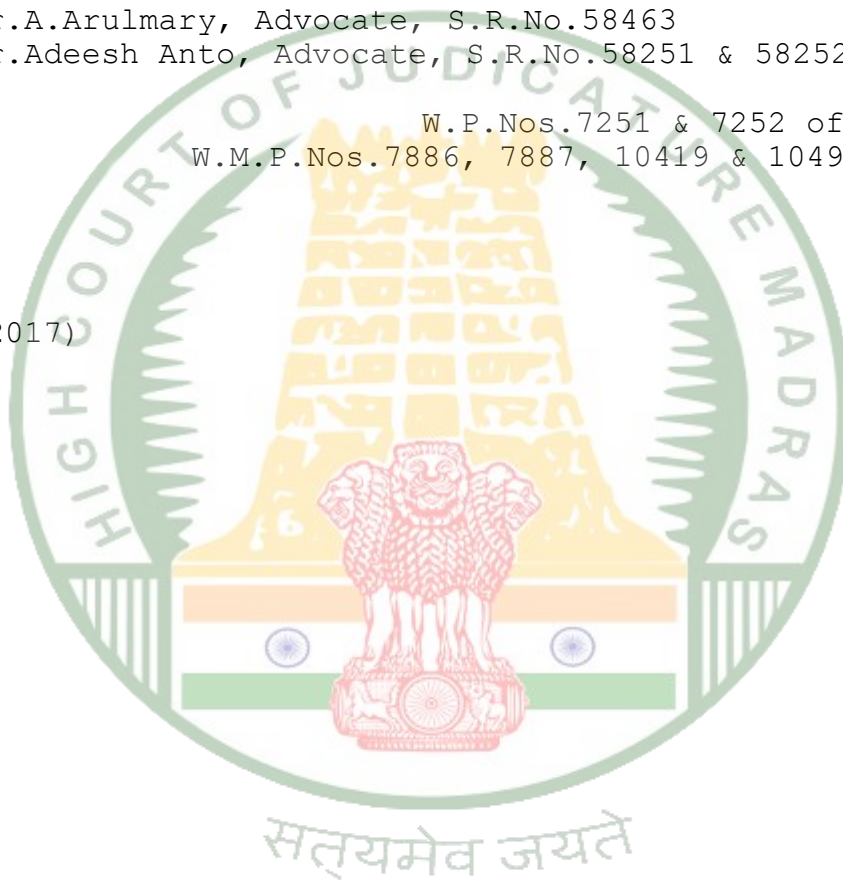
2.The Chairman,
Airports Authority of India,
Rajiv Gandhi Bhawan, Safdarjung Airport,
New Delhi - 110 003.

3.Airport Director,
Airports Authority of India,
Chennai International Airport,
Chennai - 600 027.

+1cc to Mr.K.Krishnamoorthy, Advocate, S.R.No.58750
+2cc to Mr.A.Arulmary, Advocate, S.R.No.58463
+2cc to Mr.Adeesh Anto, Advocate, S.R.No.58251 & 58252

W.P.Nos.7251 & 7252 of 2017 and
W.M.P.Nos.7886, 7887, 10419 & 10492 of 2017

GR(CO)
GN(22/08/2017)



WEB COPY